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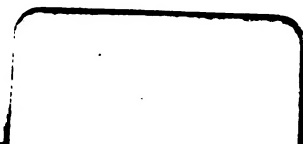
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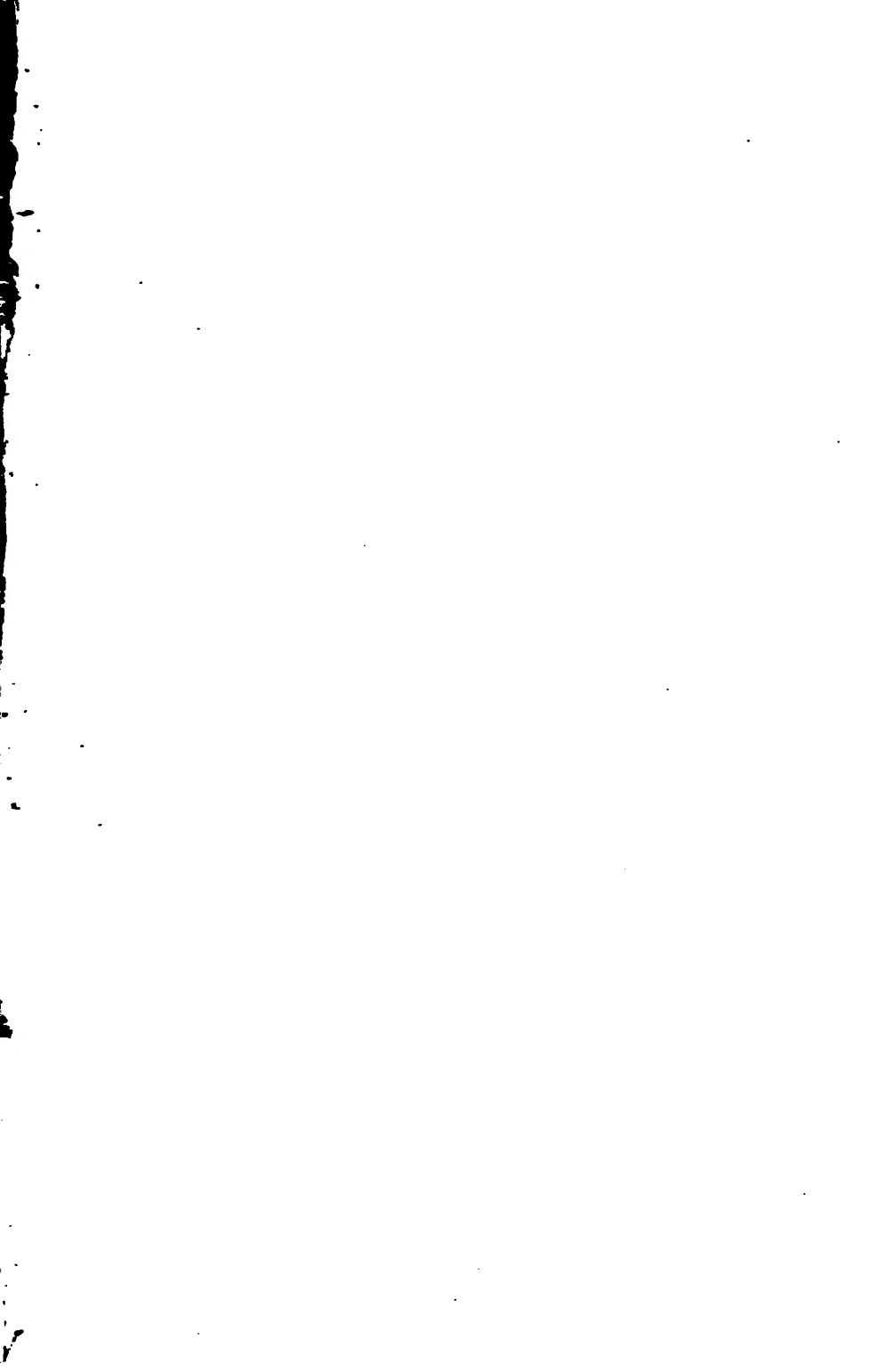
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THE REPORTS, 1884-1896.

DECISIONS

OF THE

Supreme Court of Newfoundland.

ANNOTATED, REVISED, AND EDITED

By E. P. MORRIS,

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OF NEWFOUNDLAND.



ST. JOHN'S, N. F.

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1897.

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PREFACE.

THE importance to the legal profession of having in an available form the decisions, which from time to time have been given in our Supreme Court, must be so obvious that it might appear unnecessary to say anything by way of notice or preface to the present work. Since the granting of the Royal Charter, 1825, only one volume of Reports or Decisions of the Supreme Court have been published, namely, in the year 1829, containing the decisions of the years from 1817 to 1828.

I propose that the present series shall consist of about six volumes, embracing all the reported decisions of leading cases of our Courts on points of law and general interest. The present volume, as will be seen by reference, embraces all the reported decisions from 1884 to 1896, inclusive. The second volume, now in the hands of the printer, will contain the decisions from 1874 to 1884, and so on, down to the date when the volume previously referred to was issued, each volume embracing about ten years' decisions.

I have formed the present volume out of such cases as I deemed important and instructive, and omitted such cases only as appeared not important for the current study and practice of the law, and which were only an affirmation of principles long since settled by English Courts.

In the work of revision I have been careful not to abridge any judgment except as to the pleadings or statement of facts, and unimportant as regards the result. The reasoning of the Judge and the authorities cited, no matter how prolix, have in no way been retrenched. In cases where three judgments have been given in the same cause, I have published in full, without any curtailment, the one which in every respect appeared the fullest. In but few cases has a judgment standing alone been abridged.

The head note to each case has been constructed with a view of putting briefly and without unnecessary use of technical phraseology the gist of each decision. My aim has been to furnish the practitioner with reports of our own Courts in such a form that he will readily find the information he requires for ordinary purposes.

No criticism of the work will be more severe than my own, as no one can be more sensible of its manifest imperfections. It was performed during the past year, in odd hours when free from public and professional duties, and at no time have I been able to give to it that undivided and consecutive attention which I should have liked to have bestowed upon it.

If the result should be of use to the profession, and the learning and research of those who preceded us made available, then I shall be amply repaid for the toil and labour expended on the book.

E. P. MORRIS. ·

ST. JOHN'S, MARCH 18TH, 1897.

DECISIONS OF THE SUPREME COURT OF NEWFOUNDLAND.

HAYES *v.* CARTER.

1884, *January.* HON. MR. JUSTICE PINSENT, D.C.L.

Trover—Of fifty tons of timber—Ownership—Special damage arising to plaintiff by reason of conversion.

The plaintiff claims \$1,000 damages for taking and conversion by defendant of fifty tons of timber. Defendant alleges he purchased from vendor, who sold to plaintiff, and before the property had passed to him.

Held—That the plaintiff is entitled to recover for thirty tons, that quantity having passed to him before it was sold the second time to the defendant by the original vendor.

THIS case was partly tried before me, at the Bay of Islands, on the last Southern Circuit, and the final hearing deferred to a sitting before me in St. John's, for the purpose of enabling the parties to take, before an Examiner, evidence of some absent witnesses.

The examinations having been taken and returned, the case has lately been heard and argued upon the whole evidence, before me, in St. John's.

The action is one in which the plaintiff claims from the defendant One thousand dollars damages, for the taking and conversion by the defendant of fifty-two tons of timber, alleged to be the property of the plaintiff, inclusive of special and consequential damage, arising from such appropriation, by reason of the plaintiff being unable to fill up a barque chartered for him by Messrs. Shirran & Pippy, and being thus at the loss of dead freight upon fifty tons short shipped.

The plaintiff's case is that one Gilker, a dealer of his, being in debt to him, agreed to cut timber for him at the rate of four dollars per ton, to be cut at a selected spot, the roads to the place to be made by Gilker, the plaintiff to find the team and haul the timber away. The plaintiff states that Gilker, according to his own measurement, cut one hundred and six tons, and marked them with the letter H., and he (plaintiff) hauled all this timber except seventeen tons still in the woods; it was placed in raft. He states that on 27th or 28th May, Gilker

asked him to come and take the timber away, and gave the quantity as 106 tons, and for that quantity received credit on account.

In the latter part of May, or beginning of June, the defendant (Carter) took away fifty tons of this timber, claiming that Gilker had sold that quantity to him.

The plaintiff had relied upon this timber for the loading of his chartered Barque, and he was consequently fifty tons short, for which he has had to suffer in dead freight charged to him. The value of the timber on the spot appears to be five dollars per ton.

The defendant (Carter) stated that Gilker, being in debt to him, gave him three notes which he did not pay; that he issued an attachment against Gilker, and seized under it a raft of timber he believed to be Gilker's, and out of that, with Gilker's consent, got thirty tons, having previously received from him twenty tons which Gilker measured out to him.

The first point then for determination in this case is the ownership of the timber. If the property had passed from Gilker to Hayes, prior to the delivery to Carter, the plaintiff would be entitled to it; if not the defendant would be entitled to stand upon his delivery and possession.

The defendant's principal witness is Gilker himself, who swears that the only agreement he had with plaintiff was his assent to a verbal request of plaintiff to "go cut what timber you can, bring it in to my boom, and I will give you five dollars a ton for it."

He denies having cut and delivered, under this agreement, more than about forty-six tons, and he avers that that delivery took place in July, and he categorically denies nearly every statement made by the plaintiff.

We have thus the evidence of three persons, all about equally interested in this case, and I have to look for the necessary light as to the truth to the testimony of more independent witnesses.

Sergeant Bartlett, the officer who executed the writ of attachment on the 7th June, swears that when defendant pointed out the property for him to attach, the timber was in rafts in the boom, some marked H., some M. J. H., and Gilker then and there stated to this witness that these were Hayes's logs; but he (Gilker) afterwards made an arrangement with Carter and gave him thirty tons out of the raft. Thomas Whelan testifies that he being in the plaintiff's employ, was sent by him to secure the timber in Hughe's Brook about 27th May, a week before the attachment. He was sent to take the logs, put them in a raft,

and secure them for Hayes. Gilker went with him, helped him to secure the logs, and marked them H.; that Gilker told him this timber belonged to plaintiff; that he had settled up with him that day, and given it to him, and that he allowed the quantity to be 106 tons.

Plaintiff's daughter, Ellen, swears to Gilker's directing her to credit 106 tons.

Watson's evidence for the defendant is to the effect that he helped Gilker to measure lumber on the 5th and 7th of June, and that some of it was scattered on the beach. It appears to me he must be in error in his dates, or that this was a measurement done in Carter's interest after much of the property had vested in Hayes.

It has not been made sufficiently clear to my mind that Carter received the first twenty tons after the allotment and delivery of the timber to Hayes, and the burthen of proof is upon the plaintiff.

It is abundantly clear to me that he appropriated at least thirty tons of timber, the property in which had fully vested in Hayes before the attachment.

As to the special damage arising from dead freight, it is unnecessary for me to determine, whether under other circumstances the defendant might be liable in damages for that. There is this fact in the present case which relieves him of it, and which is to be found in the evidence of Mr. Barron, the Custom-house officer, to whom Hayes (plaintiff) stated that Carter offered to sell him enough to fill the ship's charter.

On the whole case I give judgment for the plaintiff in the sum of \$150.

Mr. Morison for the plaintiff.

Mr. O'Mara and *Mr. R. McNeily* for the defendant.

1884, *February*. HON. SIR F. B. T. CARTER, C. J.

Statute of Frauds—Sale of Goods—No memorandum in writing—Non-delivery.

The plaintiff agreed to furnish 1500 Railway sleepers to defendants at a value of \$500. Defendants refused to take delivery. Plaintiff ready to deliver. No part of sleepers delivered. Contract not in writing. Nothing given in earnest.

Held—There being no memorandum in writing, no earnest money, no delivery actual or constructive, no acceptance by vendee, the plaintiff was not entitled to recover.

THE plaintiff has sued the defendants for the value of fifteen hundred railway sleepers, which, it is alleged, he was to cut and have delivered to the defendants of specified sizes, material and quality, at twenty-five cents each, by agreement made between them; and although the plaintiff did so cut and offer to the defendants, yet they refused to receive. There is also the common count for work and materials, etc. Claim: Five hundred dollars.

The plaintiff stated that according to advertisement for tenders he tendered for fifteen hundred sleepers to defendants, but the agent (Sir A. Shea) said, after two conversations, he would only take one thousand from him, the plaintiff saying that he would rather have the tender torn up than have any obstacle about it; to which the agent replied, "No; go on, cut the timber according to my word, I am able to fulfil it." Simon Gooby and Sir W. V. Whiteway, the latter of whom wrote the tender for plaintiff, were in the office at the time; he was told the sleepers should be cut and left on the bank, and that in the spring a man would be sent on to survey them, the agent remarking that he could not say at what particular place they should be delivered; there were no further directions. The plaintiff cut, prepared and placed the sleepers, as directed, on the bank at considerable expense; and they were as good a run as any he had seen, but there might be some cullage among them. Plaintiff appointed Mr. John Steer to act for him, and to enquire what further should be done. *In the fall of 1882* he brought the sleepers to St. John's; went to the agent's office for payment; did not see him, and getting no satisfaction took them back again and put them on his own premises, where they remained ready to be surveyed and delivered on payment; the freight in carrying to and from St. John's about £15. On cross-examination plaintiff stated that at Mr. Steer's (his supplying merchant) request he brought the sleepers to St. John's; no particular bank was mentioned where to place them, nor told

when to deliver them; he had no conversation with the agent after the tender in November, 1881. Others cut in the neighborhood as he did, who were, he believes, nearly all paid.

Simon Gooby substantially confirms the plaintiff as to his tender and the arrangement for cutting a thousand sleepers, and, generally, as to what passed in Sir A. Shea's office at the time, and that the latter told him he did not exactly know where they were to be landed. On cross-examination he (witness) had also tendered, but got no satisfaction about it; is a brother-in-law of plaintiff, but not concerned with him; did not see plaintiff's tender.

Sir A. Shea was examined for defendants, who stated he was agent for them in St. John's the time the alleged contract was made, that he made no contract with plaintiff for sleepers. All contracts made for them were in writing; there may have been a tender, and thinks there was one which did not result in a contract; does not remember the plaintiff coming to St. John's with sleepers. On cross-examination he stated he does not think or believe he made any representation to plaintiff. Sir W. V. Whiteway spoke to him about several people, but had no authority to prepare tenders from witness; do not remember plaintiff asking to have tender cancelled; gave no instructions to go on except when there was a contract in writing; he was the only one authorized to contract for the company.

On leave reserved, Mr. John Steer was examined for the plaintiff, who stated that he was agent for the plaintiff, who wrote him about the sleepers, after which he saw Sir A. Shea, who told him they had men ready for some weeks to send to Random to take *delivery* of the sleepers that plaintiff had cut, and advised him to write the plaintiff advising him to lay them on the bank at Shoal Harbor, and as soon as possible the men would be sent on to take delivery; the date of witness's letter to plaintiff is 10th April, 1882; knows the sleepers came on here, as he thinks *in the spring of 1882*, and were taken back again; he can't say why sleepers brought here after his letter, perhaps he advised plaintiff to do so; can't say if sleepers ever at Shoal Harbor; plaintiff lived at Heart's Ease.

Counsel were heard on both sides, and Mr. Kent, Q. C., having previously moved for non-suit, contended that the plaintiff had no cause of action, as the seventeenth section of the statute of Frauds declared—

"That no contract for the sale of any goods, etc., for the *price* of ten pounds or upwards shall be good, except the buyer shall accept part of the

goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents, thereunto lawfully authorized."

By the 9 Geo. IV., c. 14, sec. 7, it is provided—

"That the above enactment shall extend to all contracts for the sale of goods of the value of Ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The two statutes are to be construed as incorporated together, (*Headly vs. McLaine*, 10 Bing. 482). There certainly was no note or memorandum in writing by way of agreement or contract, nor was there anything given in earnest or in part payment. Was there then a delivery, actual or constructive, and acceptance? I do not think there was by one or the other, vendor or vendee, as the evidence, to my mind, clearly shews. It has been held and is the law that to satisfy the statute there must be a delivery of the goods with an intention of vesting the right of possession in the vendee, and there must be an acceptance by the vendee with an intention of taking the possession as owner (*Phillips v. Bistoli*, 2 B. & C. 511); or in other words there must be "a contract of sale and an acceptance and receipt by the vendee in the character of owner of the goods contracted to be sold, leaving it to parol evidence to shew what the precise terms of the bargain were, per *Crowder, J. in Tomlinson vs. Straight*, 17 C. B. 707; the acceptance must be unequivocal (*Maberley vs. Shepperd*, 10 Bing. 101). I might refer to numerous decisions to the same effect which can be found in several text works on the law of contracts. If the plaintiff's representations be true he would appear to have some equities, but I feel constrained by the statutes referred to, which are applicable to this case, to award judgment for the defendant.

Mr. R. McNeily for plaintiff.

Mr. Kent, Q. C., for defendants.

1884, *March*. HON. MR. JUSTICE PINSENT.

Will—Construction as affected by Codicil—Where legatee dies before legacy vests in him—Accumulation legacy.

Held—Where the legatee dies before the legacies bequeathed him vest in him, his executor can take nothing under the bequest. Where the bequest is an accumulation, of a sum left in trust to be put at interest, it is in the nature of a joint tenancy; and one of the legatees dies before the final period of accumulation has arrived, his representatives do not share in the accumulation, and his share accrues to the others jointly interested. The yearly accumulations do not vest year by year the fund is indivisible.

THE ultimate question in this case is the interest (if any) of Laura Jane Nisbet in the estate of the late Neil MacDougall, the elder, she being the widow of his son, Neil MacDougall, the younger.

Neil MacDougall, senior, died in June, A. D. 1875, leaving him surviving a widow and seven children—Neil, John, Dougald, Donald, Henrietta, Thomas and Florence.

In 1872 MacDougall, the elder, had duly made and executed a will by which he directed that his business of Oil Clothes manufacture should be carried on for ten years from the date of that will for the benefit and support of his wife and children, under the management of his son, Neil, at a salary of £120 per annum, subject to testator's widow's inspection. The will directed the manner of investment of any surplus profits, and provided that no distribution of the principal sum or interest of such investments should be made until the expiration of ten years from the date of the will.

The will proceeded to direct that after the expiration of ten years the widow should have during her life £270 per annum for the support of herself, Henrietta, Florence and Thomas; that Henrietta should have thirty pounds a year for apparel and pocket-money until her marriage.

The testator bequeathed to his son, John, £500 in full, payable at the expiration of ten years.

He bequeathed to Neil, *after the expiration of that time*, his two Factory buildings, the good-will of his business, and £1200, adding "and should my son, Neil, die before the expiration of the said ten years, and my son Dougald not paid his share he (*i. e.*, Dougald) is to have the factories, good-will and amount aforesaid, and to manage the business at the same compensation, otherwise to become part of my residuary estate."

The residue of the estate testator bequeathed equally amongst his children Dougald, Donald, Thomas, Henrietta and Florence,

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and the survivor or survivors of them; and the testator directed "should any of my said children have married and *having died leave a child or children at the time appointed for the distribution,*" such child or children were to take the parent's share.

In July, 1874, testator made a codicil cancelling the legacy of £500 to John, and directing "*It is my desire that all the children should share and share alike,* John will therefore share like the others."

The testator by this codicil directs the investment of a sufficient sum to provide the three hundred a year for his wife and daughter Henrietta, and adds "*when this is done and Neil paid, the balance remaining can easily be ascertained.*"

This balance, he directs, shall be equally divided between Dougald, Donald, John and Thomas.

By a second codicil, executed in July, 1874, the testator reciting that he has bequeathed to his son, Neil, more than his circumstances will warrant, having regard to the claims of his other children, bequeaths him "one thousand pounds instead of twelve hundred, in stock and cash, the stock to be computed at first cost, sou-wester block and sewing machines to be included at inventory value," and adds "he is also to get the two factories," and then directs that a sum equal to one-fourth of the clear profits of the business shall be lodged in the Union Bank every year for ten years, beginning on the first year of his (Neil, jr's) assuming the business, to be lodged in the testator's wife's name, in trust for the benefit of all my children."

After the death of his father, Neil MacDougall, jr., managed the Oil Clothes business, but he died in October, 1876, leaving him surviving his widow (Laura Jane), one of the present plaintiffs, now the wife of Alexander Nisbet; and Neil, jr., by his last will and testament, bequeathed all his property to her and made her his sole executrix.

We are asked to decide what construction the three testamentary papers, executed by Neil MacDougall, sr., bear in their effect upon each other, and with regard to some of their clauses.

One position taken is that by the first codicil (that of 18th July, 1874) all the conditions attached to the bequest to Neil are removed, and, indeed, that its general effect is to substitute other provisions for those elaborately set out in the will as to carrying on the business, the periods of vesting, distribution, and so forth.

If this codicil had stood alone, there would have been great

force in the contention, that after investing a sum sufficient to provide the three hundred pounds annuities, Neil, was to be paid absolutely, and the balance divided amongst the other sons, and that when the trusts attaching to the sums set apart to yield the annuities were fulfilled, the amount would fall into the residue and become distributable amongst all the children mentioned in the residuary clause of the original will, with John now included.

In this view Neil would have become entitled to the factories and the £1200 on the death of his father.

We do not think, however, that we should have construed this codicil, even if it stood alone, as dispensing with the conditions attaching to Neil's legacies in the first will, but should have held that the testator had undergone no change of intention, and had expressed none as to the investments for annuities and the distribution of other portions of the estate being postponed for ten years, and being dependent for their effect according to the terms of the original will.

Any doubt raised upon these points is, however, effectually disposed of by the second codicil (that of July 21st, 1874) by which, in reducing Neil's legacy of £1,200 to £1,000, testator expressly refers to its being represented by stock and machinery, and speaks of the investment of one-fourth the profits of the business for ten years, and so forth.

The testator thus clearly incorporates the three testamentary papers which we, therefore, hold must be read together.

As Neil, jr., died before his legacies of the £1,200 (reduced to £1,000), and of the two factories vested in him, his executrix can take nothing under these bequests.

We have experienced no little difficulty in construing the last clause and bequest of the last codicil, which directs that a sum equal to one-fourth of the clear profits of the business shall be lodged in the Union Bank, year by year, for ten years in the name of the testator's wife, "in trust," as the testator expresses it, "for the benefit of all my children."

If this legacy were to be taken as superseding all the former bequests relating to the application of profits and reservation of annuities and so forth, then if the prosecution of the business represented any clear profit it would appear that one-fourth of such profit would require to be absolutely set aside "in trust for all the children." This language *ex vi termini*, would include Neil; and if Neil had survived the final period of accumulation he would have been entitled to share in this

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fourth with the other members of the class, but he did not so survive, and the words of the bequest are in our opinion strictly those of a joint tenancy, and his share would consequently accrue to the others of the class. It is suggested that the yearly accumulations might be held to vest year by year; we do not think the bequest is capable of that construction, but that the fund is indivisible and must be regarded in its entirety after the ten years' accumulations.

As the difficulties in this case have arisen from the confused and complicated language of the testamentary papers, let the parties to this suit have their costs as between party and party out of the general estate.

Mr. Boone and Mr. Johnson for Mrs. Nisbett and others.

Solicitor General, (Mr. Winter), and Mr. Morison, for the executors Neil MacDougall, senior, and others.

DUDER v. DUDER.

1884, *March*. HON. SIR F. B. T. CARTER, C. J.

Will—Construction—Lapsed legacy—“Newfoundland Wills’ Act,” 17th section—Meaning of words “living at time of death of testator”—Legacies to tenants in common nomination when legatee predeceases testator.

The Newfoundland Wills’ Act, Consolidated Statutes, 17th section—(same as English Act, 1 Vic., cap. 26, sec. 33), provides “where any person being a child, or other issue of the testator, to whom any property shall be devised, or bequeathed, for any estate or interest, not determinable at or before the death of such person shall die in the life time of testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator; such devise or bequest shall not lapse but shall take effect.”

Held—That a child *en ventre sa mere*—the father legatee—having predeceased the testatrix, is to be regarded as issue “living” at the death of testatrix, and that the legacy does not lapse. Where legacies are given to legatees as tenants in common nomination, if any die before the testator, their portion or share would lapse into the general estate.

THE bill in this case states that Mrs. Mary Elizabeth Duder, late of St. John’s, widow, who died there in the month of December, 1881, among other bequests, bequeathed as follows:—Second: “I give, devise, and bequeath all my land, situate on the north side of the Circular road, in St. John’s, aforesaid, to

the eastward of property belonging to March's estate, to my two sons, Edwin John and Arthur George, to be equally divided between them. Third: I give, devise, and bequeath all the residue of my estate, effects and property, both real and personal, whatsoever and wheresoever, to my said sons, Edwin John and Arthur George, share and share alike." She appointed the said Edwin John and Arthur George, executors.

The said Arthur George pre-deceased his mother in the month of December, 1881, and the said minor mentioned among the parties plaintiffs, is his son by the said Isabel Duder, and was born on the 2nd May, 1882, over four months after the death of his father, Arthur George, to whose estate the said Isabel Duder was duly appointed administratrix, and the said Prescott Emerson was duly appointed guardian to the estate of the said infant.

The defendant, as alleged, entered into possession of the said land, received the profits and also compensation for part of it taken for railway purposes.

The bill prays that the rights of the parties may be declared; that the bequest of the said land to the said deceased, Arthur George, as a tenant in common with the said Edwin John, may be decreed to be vested in both or one of the plaintiffs, and that the said defendant be ordered to account, &c.

The defendant, by his answer, admitting the material statements in the bill, states that after the making of the said will, the said testatrix, Mary Elizabeth Duder, made a codicil thereto, as follows: "The within named Arthur George Duder having died, I give, bequeath, and devise all of the share of the residue of my estate, which is by the within will bequeathed to Arthur George Duder, unto the within named Edwin John Duder, and in all other respects I ratify and confirm the within will, and I make this as a codicil to the within will of the 12th day of May, Anno Domini one thousand eight hundred and eighty-one."

That the said will and codicil were duly proved and probate granted to the defendant on the 23rd January, 1882; the defendant claims the said land as his own, and prays that the bill be dismissed with costs.

The Solicitor General and Mr. Boone for the plaintiffs.—The codicil sufficiently confirms the bequest to prevent a lapse, and is a republication of the will. There was issue living of the legatee at the death of the testatrix. A child *en ventre* in the contemplation of the 17th section of title 5, "Of Wills and Tes-

taments," Consolidated Statutes, 1872, renders the bequest as effectual as if the legatee had outlived testatrix. [Cited *Doe dem, Clarke vs. Clarke*, 2 H. B. 400. *Doe dem, Lancashier vs. Lancashier*, 5 D. & E. 49.]

The Attorney General for the defendant.—The codicil shews intention to revoke all bequests to Arthur George Duder, and to be so construed if such intention can be gathered from the context. [*Jarmyn on Wills*, 7 Sim. 208, 5 Ves., 423.]

Under the Wills' Act the term "living" at death of testatrix, means born at such time. There was no lapse, as this was a bequest to a class, and the whole vested in the defendant as the survivor. [*Williams on Exrs.*, 1879, Ed 1222, and cases cited.]

The most important point to be disposed of in this case is, that which arises and on which the plaintiffs mainly rely in sustinment of their position under the 17th section of our Wills' Act, referred to in the argument, which corresponds with and in fact was copied from the 33rd section of the English Act, 1st Victoria, cap. 26, as follows:—

"Where any person, being a child or other issue of the testator, to whom any property shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

The question under this section is whether a child *en ventre sa mere*, about whose legitimacy there is no doubt, the father, legatee, having pre-deceased the testatrix, is to be regarded as issue "living" at the death of the testatrix so as to prevent a lapse. So far as I am aware there is no case to be found since the English Wills' Act upon which any question was raised in a similar matter to this, as to the construction to be placed on the words of the 33rd section, or our 17th section referred to; and it is not unreasonable to infer that the ruling of the courts had so established the principle of law that it was regarded as of too settled a character to admit of doubt. It will be observed that the benefit of this clause is confined to a person being a child or other issue of a testator who shall die in his life-time, leaving issue living at his death, and not in general terms as applying to all legatees, and the object in view would, as it appears to me, be to a great extent defeated if a different interpretation were placed on the term *living* than given in numerous decisions, as regards a child *en ventre* of a legatee, for whom and

whose issue natural affection would induce a testator so related to provide. In a matter involving such serious consequences the Legislature would be careful to use terms having in law a defined meaning, and not leave the construction open to contention where avoidable. The Act does not say "issue born," which is to be distinguished from *living*, and yet so far have the courts gone to extend the benefits of bequests to posthumous children, that in the case of *Trover vs. Butt*, 1 *Law J. Chanc.*, 115, "it was decided that a bequest of personalty in trust for all the children of the testatrix's nephew, *born in the life-time of the testatrix*, included a child of which the wife of the nephew was *en ciente* at the death of the testatrix, although not born until several months after such decease." This doctrine was sustained by Lord Chancellor Westbury in *Blasson vs. Blasson*, 34 *L. J. Chanc.*, p. 18. In the cases of *Lancashier vs. Lancashier*, and *Clarke vs. Clarke*, cited at the bar, which refer to numerous adjudications, Lord Kenyon in the first of these cases says, "that it would be contrary to law, justice and good sense, and every principle on which the doctrine of Wills, both in Ecclesiastical and Common Law Courts, is founded, to determine that there is any difference in this respect between a child actually born and a posthumous child," and in the other case by Chief Justice Eyre, "that an infant *en ventre sa mere*, who by the course and order of nature is then *living* comes directly within the description of children living at the time of his (testator's) decease," and by Bullen J." It is now laid down as a fixed principle that whenever such a consideration would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born, and to all intents and purposes a child as much as if born in the father's life-time, and consequently is entitled under the statute of distributions, *Williams on Exec. 1506*, and cases there cited. A child *en ventre sa mere*, is a child in *esse* and may have a name by reputation, per Lord St. Leonard's in *re Connor*, 2 *J. and Lat.*, p. 460 *Theobald on Wills 238, 2 Ed.* I think it unnecessary to refer to many other cases to the same effect. In the construction of statutes, the courts have great regard to the legal meaning which has been attached to terms with reference to a particular subject, and would be very indisposed to place an interpretation in opposition to a long current of authorities. *Wilberforce on statutes*. Now, is there anything in the testamentary documents to shew with reference to the qualifying provision at the end of the 17th section, "unless a contrary intention shall appear by the will" that the testatrix

did not intend that "the issue" meant by this section should take. I think otherwise as by the codicil, whilst she expressly revoked the share of Arthur George in the residue, and bequeathed it to the defendant, immediately following is "and in all other respects I ratify and confirm the within will," although on reference to authorities I do not regard this would be sufficient of itself to prevent a lapse but for the statute, yet it may be accepted as indicating no alteration in the original intention to leave the gift of the land in question untouched, therefore "no contrary intention appears."

The Attorney General contended that this was a gift to a class and as such, on the death of Arthur George, the right in the whole would belong to the defendant as survivor. In this position I do not concur, and think there is a clear *designatio personarum*; the gift is "all my land, &c., to my two sons, Edwin John and Arthur George, to be equally divided between them." In the recent case of *Shiers vs. Ashworth, in re Jackson Chan.*, Vol. 32. W. R., 194, the principal decisions on this subject are reviewed. In *re Stanhope's Trusts*, 27 Bear., 201, a leading case on class construction, having regard to the form of the gift on which the question in such cases mainly depends, the Master of the Rolls, in giving judgment, says:—"I think this is a gift to a class, though in my opinion not a very clear case. If it had been a gift in trust for these four daughters, H, M, C. and A., and their issue, and it had stopped there, I should have been clearly of opinion that it was not given to a class," which I may say in form and principle is substantially the same, but, if anything, more favorable to a class than this case which expressly gives the land equally. By reference to that case it will be seen that the testator bequeathed his estate for his then living daughters, naming them and other daughters that might be born thereafter, shewing that daughters as a class were there intended to be benefited, which is a widely different form of bequest from that under consideration. *Sir Puge Wood in Chaplains Trusts*, 12 W. R., 147, says "it must be a gift to them as a class and not a gift to them as individuals, it must be a gift to them in such a way as that the set of persons is not referred to individually, but simply as a class intended to be benefited by a common ancestor." Where legacies are given to legatees as tenants in common nomination, if any die before the testator, their portion or share would lapse into the general estate. *Williams Errs.*, 1222, and so in this case but for the section of the Wills' Act just quoted. The authorities on that have decided

that where it is a gift to individuals it applies, but where it is a gift to children as a class it does not; *re Jackson Supra*. This section does not substitute the issue for the deceased legatee, but gives the legacy to him absolutely as though he had survived the testator, therefore, in intestacy as in this, the undivided moiety of the land in question belongs to the general estate of Arthur George Duder, represented by the plaintiff administratrix. We are all of opinion that the plaintiffs are entitled to our judgment in whose favour we so adjudge and decree that the moiety or half part of the aforesaid land described in the will of the testatrix vests in the said Isabel Duder, administratrix aforesaid, as tenant in common with the said Edwin John Duder, defendant, and that he do account for the rents and profits of the said land since his occupation, and for all monies received by him for compensation or otherwise on account thereof, and pay over to the said administratrix the one-half part of the whole, subject to all reasonable allowances and with all proper references to the master, &c. Each party to bear his or their costs to the present and any further costs that may be necessarily incurred to be paid by the defendant.

Before concluding, I cannot forbear remarking on the omission of any reference in the bill to the codicil, which is regarded as part of the will and incorporated in the probate as the one instrument, that first appeared in the answer of the defendant, and this too on a bill asking for directions. There may however be some undisclosed reason for this rather singular course, but the circumstance was not adverted to on either side in the argument.

The Solicitor General and Mr. Boone, for the plaintiff.

The Attorney General and Mr. Johnson, for the defendants.

16 MEEHAN v. NEWFOUNDLAND RAILWAY CO.

1884, *April*. HON. MR. JUSTICE PINSENT AND HON SIR
F. B. T. CARTER, C. J.

Arbitration award—Newfoundland Railway Company's Act—Ejectment of Company from land taken under Act of Incorporation—Tender of award to arbitrator—Effect of arbitrator acting as agent for proprietor of land.

The Newfoundland Railway Company "required for railway purposes" certain lands which, under their Charter of Incorporation, was provided by the Government in proper legal course. The proprietor of the land, whilst assenting to the reference to arbitration, never agreed to the award, nor did her arbitrator sign the same. The Government arbitrators both signed the award. No tender of compensation or award was made to proprietor, though repeatedly made to her arbitrator, who declined to accept. The Company entered upon the lands before arbitration was held, or award made, and constructed its line. In an action of ejectment by the proprietor of the land against the Company, on the grounds that the award was void, and that she never became divested of her title in the same—

Held—Proprietors of land are not bound to cede same without previous compensation having been paid or tendered. Compensation must precede the acquisition of land by the Company. Notice of appropriation, or becoming party to a reference to arbitration, not sufficient to affect title of proprietor. Payment of award, or tender, to proprietor is necessary to give right of possession to Railway Company by default of which the proprietor has not been ousted of her title in the land. Where land is submitted for arbitration, the owner is estopped from afterwards setting up, that it is not "required for Railway purposes." Arbitrators totally mistake their position, when they act as agent, and the Court will not recognise any such dual position.

THIS is an action of ejectment taken for the recovery of certain waterside property situate on the northeastern side of the harbor of St. John's.

There can be no doubt of the plaintiff's title in the land and right to its possession if it be not that the *locus in quo* has been acquired by the defendant Company under its Act of Incorporation

The Company's case is that this land was required for legitimate Railway purposes, and that, being so required, it was "provided" by the Government for the Company in proper legal course, and that the title to it, as against the plaintiff, with the right of entering upon, occupying and using it, became and now is vested in the defendant Company.

It is said that the usual notice that the land was required was given in October, A. D. 1881; that two Government arbitrators were duly appointed, and that the plaintiff appointed an arbitrator, according to the Statute, in the person of Mr.

Wm. M. Barnes. In fact, the due appointment and swearing in of all these arbitrators is undisputed.

An award was finally made in May, 1882, and this award is that of the two official arbitrators only; awarding for certain described land, delineated in a diagram attached the sum of \$3,048.

The arbitrator, Barnes, declined to join in the award, claiming that the amount should have been some seven or eight times larger than that allowed by the other arbitrators.

The defendant Company, which had entered upon the land and run its line through it before the arbitration of the plaintiff's claim, has since continued in possession, and the plaintiff now seeks to eject the Company upon the ground that the award is void, and that her title to the property has not become divested in any way.

The defendant's case was supported by evidence of the award and other formal documents, and by the testimony of Mr. A. M. Mackay and Mr. P. Cleary, the arbitrators appointed under the Statute by the Government. They say that Barnes appeared upon the arbitration as the plaintiff's representative and agent as well as arbitrator, produced the evidence of her title, sat with them on several occasions, and considered the amount to be awarded; that they proposed a compensation at the rate of \$8 per foot, afterwards raised to \$9; that to neither of these propositions would Barnes assent, and that having allowed the award to remain over for six months, they (Mackay and Cleary) signed it, having first apprized Barnes that if he did not come in they would be under the necessity of making a majority award, and that he answered it must go to the Supreme Court. These witnesses say that they have no recollection of Barnes saying he could produce evidence on behalf of the plaintiff to sustain his estimate of value; that if he had produced any such evidence it would have been received.

They say the value of the ground was derived from their knowledge of other similar places, to which they had awarded \$8 per foot, waterside frontage, or about twenty years' purchase of the leasehold; that in this case, considering the tenant's rent low, they allowed the highest sum that was allowed for any similar property, viz.: \$9 per foot, and an additional sum of \$600 for the buildings. They say Barnes desired them to re-open the award after it was signed, which they declined to do. The place is used for the Railway cars to run down one way and up the other upon rails forming what is

salled a Y. The rule was to send the award when made to the Colonial Secretary and Surveyor General's Office, where the parties would get their money.

It appears the money awarded has never been paid, nor tendered, nor any notification sent to the plaintiff, but the defendants say it was useless to tender, as Barnes, who acted as plaintiff's agent as well as arbitrator, would not submit to the amount awarded, and said they were going to the Supreme Court.

It will be observed that Barnes was not called as a witness on behalf of the plaintiff, nor was a rebutter case of any kind offered at the trial.

The plaintiff's counsel contended on this case that the award was void because Barnes having withdrawn, the reference fell through. That the defendants, in any case, had no right to take this land as it was not necessary for their purposes; that the notices to plaintiff and to Barnes of the intended making up of the award were insufficient; that the arbitrators had omitted to take proper evidence, and rightly to consider the plaintiffs case; that the plaintiff had not been paid for the land.

The defendant Company, on the other hand, contended that the award was final and binding, and that this Court could not go behind it. That tender of the amount of compensation was not necessary, that if it were it had been waived by the acts of the plaintiff and her agent.

The Court reserved to both parties the points raised, and I sent the case to the jury to find a special verdict (to be afterwards entered by the Court for the plaintiff or for the defendant) upon several questions settled by the Court and submitted to them.

We held that if the jury found that the land sought to be recovered in this action had been submitted to the plaintiff as the subject of the arbitration in this case, then she was precluded and estopped from now contending that it was not required by the defendant Company for Railway purposes.

The jury found (1), that the arbitrators appointed by the Government were appointed with reference to that land; (2), that the plaintiff appointed Barnes to arbitrate upon the question of compensation for that land; (3), that the three arbitrators proceeded to act; (4), that the claim for compensation for this land was preferred, entertained and heard by the three arbitrators; (5), that the plaintiff through herself or agent was

notified of the hearing and allowed opportunities of being heard ; (6), that Barnes withdrew from the reference and that the other arbitrators proceeded without him ; (7), that the cause of Barnes's withdrawal was that he did not coincide in the amount of the award ; (8), that the two remaining arbitrators did not refuse or omit to hear the plaintiff's case, or to receive evidence on her behalf, and were not guilty of any misconduct or corruption ; (9), that the remaining arbitrators proceeded to make the award produced in evidence, and that it was made in reference to all the land, the subject of this action ; (10), that the proprietor (the plaintiff) was represented by Mr. Barnes as agent as well as arbitrator ; (11), that the amount awarded had not been tendered ; (12), that the necessity for tender was waived by the conduct of the proprietor or her agent ; and by the intimation or fair inference that it would be useless to tender, because of the insufficiency of the amount awarded and of intended litigation thereon. Upon these findings of the jury and directions of the Court, the parties to the action respectively, took their rules for entering the verdict for the plaintiff, or for the defendant Company, as the case might be, and these rules having been heard, we are now called upon to decide to whom the postea shall be delivered.

In the course of the various cases affecting rights of property under the Act of Incorporation of the defendant Company, this Court in construing the charter has held,—that there are no words in the Act sufficiently certain and comprehensive to compel proprietors to cede their lands without previous compensation being made ; that it is not sufficient for the Government to have given a notice of appropriation, nor even for the proprietor of land to have become party to a reference, but that all such proceedings must have been consummated by compensation to the proprietor before he shall have lost and the Company shall have acquired title to the lands required for the purposes of the Railway.

The Court has also held with regard to the right of appropriation of such lands, that "The Court is bound to keep corporations within the limits of their statutory powers, and where the sacred rights of private property are involved, any doubts should be resolved in favor of the proprietor ; on the other hand, it is clearly laid down that where persons are empowered by the Legislature to take lands compulsorily for the purposes of an undertaking, they are the proper judges of what land they need, they may take as much land as they deem necessary for

the proper construction of the works they are authorized to make, and of the works incidental to the main purposes of the undertaking, provided they act *bona fide*; but they cannot be allowed to exercise those powers for any purpose of a collateral kind, that is for any purposes except those for which the Legislature has invested them with extraordinary powers."

In this case there is literally no evidence that the land was not required *bona fide* for the purposes of the Railway, but any evidence there is, is the other way. Moreover it is shewn, and the jury find that the land sought to be recovered in this action was the subject of submission to arbitration by both plaintiff and defendant, that the only difference was as to the rate per foot frontage to be awarded for it. We held at the trial as we now do that the plaintiff is estopped from now disputing the right of the Government to claim the land for the Railway Company.

The Court has intimated upon former occasions, and now holds, that the arbitration provided by the Act which is in the nature of an appraisement is, for the purposes for which it is constituted, final and binding, and that the jurisdiction of the Court is ousted as long as the proceedings of the arbitrators are conducted with substantial regularity, and are free from fraud and misconduct.

I am upon this point of opinion that except where the irregularity or misconduct has been such as to make the award wholly void, the parties are bound by it, until it is set aside; and that in an action such as the present they would (unless it be void) be precluded from disputing it. The question then is: Is the award in this case void?

It is contended on behalf of the plaintiff that under the circumstances there was a revocation of the appointment of Barnes as arbitrator, and that he withdrew from the reference, and that the submission to arbitration thereupon became annulled and vacated.

In the first place there is no evidence whatever of revocation; the evidence is, and the jury find, that Barnes withdrew because of his dissatisfaction with the amount awarded, and it is shown that so far from his considering his appointment revoked, he desired the official arbitrators to re-open the award long after they had signed it.

But I am of opinion that there is no power in a party to a reference under this Railway Act to revoke the appointment of the arbitrator, and any attempted revocation would go for

nothing There is positive provision that in case of failure by a claimant to appoint, an appointment shall be made for him, and then that in the case of disagreement the award of any two shall be final. Were it otherwise, the land clauses would be a mere nullity, and their operation might be defeated at any stage by a dissatisfied party.

There has been an attempt made to shew that the official arbitrators proceeded irregularly, and that there was an absence of due notice to Barnes of the making up of the award, and that the plaintiff was prejudiced by reason of the arbitrators not receiving or hearing evidence which might have been produced in support of a case for larger compensation.

Perhaps, unfortunately for the plaintiff, the evidence in this case produced by the defendant Company remains uncontradicted; and the jury have found on all the issues in favor of the defendants; but assuming irregularities such as those which are alleged to have taken place, the course was not to have relied upon them in the prosecution of an action, but before taking the action to have applied to a court of competent jurisdiction (a Court of Equity in this case) to have set aside the award.—*Russell, 634 et. Seq.*

The award, as it is, comes before the court in valid form, and we are, in my judgment, bound to give effect to it so long as it subsists intact.

One point of importance remains, and that is the question of tender.

Consistently with the ruling of this court in former cases, I must hold that compensation has to be made to proprietors before they can be ousted of possession and title as against them acquired by the Company.

It is admitted here that no money was paid, and none tendered, nor does any seem to have been specially provided or offered to be paid by the Government or the Company in discharge of the amount awarded to the plaintiff for compensation; but it is contended, any such course was and would have been useless; that Barnes was agent throughout for the plaintiff; that he repudiated the sum to which the others had agreed, and declared that nothing remained but resort to the Supreme Court.

The jury have found with the defendant Company upon this issue also.

It remains for us to say, whether as a matter of law and right, we can bind the plaintiff by the conduct of Barnes in this particular.

With reference to the position of one assuming to act as agent as well as arbitrator, the courts have not been silent, but have frequently expressed the strong objections felt upon the subject.

In *Calcraft vs. Roebuck, (1 Vesey)* the Lord Chancellor observed, "It is not uncommon for a person appointed arbitrator to consider himself as agent for the person appointing him. How that is so common I wonder, as it is against good faith. The bond says he is an indifferent person, and he breaks a most solemn engagement in considering himself otherwise"; and in *Watson vs. the Duke of Northumberland*, the same principle is applied to commissioners for executing a survey and partition, who were "said to have totally mistaken the situation in which they stood, their duty and the confidence placed in them by calling themselves defendants' or plaintiffs' commissioners."

Awards have been frequently set aside for misconduct in the arbitrators upon this ground.

Regarding, then, the true position of an arbitrator, it appears to me that the Courts cannot recognize any agency in him, and that, so far as the case now before us is concerned, it is only at liberty to assume that the plaintiff left the work of arbitration or appraisal in his hands and was satisfied that the reference should proceed without her presence or active interference.

In my judgment we have no proof of any agency on the part of Barnes to receive or reject on behalf of the plaintiff the amount of compensation determined upon after it had become the subject of award; and consequently, that his dissatisfaction as to the amount, and intimation that litigation must follow, can only be regarded as the expression of his own opinion and were no waiver of the necessity of notifying the plaintiff of the execution of the award and of making provision for its payment, and giving the plaintiff notice that such provision had been made, and placing her in a position to receive the amount.

I am of opinion that the official arbitrators and other authorities dealing with these questions of arbitration and compensation should not have recognized, but should at all times and in all cases have repudiated any such joint position as that of combined agent and arbitrator in the person associated with them, and should themselves at all times carefully abstain from acting or appearing to act as Government or Railway agents.

Whatever course the plaintiff may be advised to take hereafter with reference to the arbitration and award in this case, I have for the purposes of the present action to hold, that under the circumstances, from default of tender or known provision

being made to respond to the award, the compensation has not been made to the proprietor, which has been held to be necessary under the Statute to give the right of possession to the Railway Company with the incidents of property, and that the verdict must on this ground be entered for and the postea delivered to the plaintiff.

SIR F. B. T. CARTER, C. J.:

IT is unnecessary to recapitulate all the facts set out in the judgment of Mr. Justice Pinsent, who had charge of this case at the trial. I was present nearly throughout and we concurred in the several points which were submitted to the jury.

The action was brought for the recovery of certain land in St. John's, and the substantial question is, whether by an award under the Incorporation Act of the defendant Company they acquired a title against the plaintiff.

The Solicitor General obtained a *rule nisi* to have the verdict entered for and the postea delivered to the plaintiff upon the finding of the jury on the several issues left to them, or that a new trial be granted on several grounds. Both parties were heard by their counsel, and after consideration, I shall now give the opinion at which I have arrived in this case.

Up to the entering on the land by the defendant Company, no question was raised as to the title of the plaintiff, and we have long since decided that compensation, or what is in law equivalent to it, must precede the acquisition of land belonging to private proprietors by the Company for their railway purposes.

Admittedly there was no payment made to the plaintiff, although it was alleged that the money was ready for her acceptance to be paid by the Government, and this may be regarded as probable enough. Was there then a sufficient tender or was it dispensed with?

The law says there must be an actual offer of the money or the production of it must be dispensed with by the express declaration, as by saying the defendant need not produce it, or equivalent act of the creditor; *Thomas vs. Evans*, 1, E., 181, per Lord Kenyon, C. J., 4 Esp., 68; for though the plaintiff might refuse the money at first, yet if he saw it produced he might be induced to accept it.

If Mr Barnes, the arbitrator, were shewn to have been authorized as an agent to receive payment and to give a receipt for it, and offered to him, that would have been a sufficient tender

to the plaintiff; *Goodland vs. Blewsitt*, 1 Camp., 447; *Moffatt vs. Parsons*, 5 Taunt., 307.

The money was, therefore, neither offered or its payment dispensed with according to the facts and authorities.

Besides the non-payment or tender it was (1) contended that this land was not necessary for the defendant Company under the terms of the Act, and that the jury were improperly directed that the plaintiff was estopped by her own act from raising the question, and that it should have been left to the jury to say, whether the whole of the land was taken and entered upon by the Company for the purposes of the railway; there was no evidence to shew that it was not necessary, nor was there any question on this point at the time when the arbitrators met as to the extent of the land required. It might well have been so, as one can hardly consider any description much more indefinite than "between Hoyles' Town and Waldegrave Battery," referring to a schedule annexed, which was not annexed to the notice, except it be the vague and uncertain verbiage of the act itself, as regards the location of the line in St. John's, so that it could not well be called "certain land" in legal phraseology. Yet the plaintiff acted upon the notice, appointed her arbitrator, produced title deeds, and the proceedings sufficiently indicated the land the subject of the arbitration, by all which the plaintiff has in my mind, estopped or precluded herself from now disputing the extent and boundaries of the land described in the diagram annexed to the award. It was open to the plaintiff to have contradicted this if so advised. The law of England so jealously regards the rights of property that the courts will not construe the compulsory powers of a Railway Company so as to extend them beyond the express words, or absolutely necessary implication of the Act, it being the duty of the Company to take care that the public understand before the Act is passed the extent of the compulsory powers which they require; per Sir G. M. Giffard, L. J. If companies wish to extend their compulsory powers they should tell the public so plainly, and they should give the public the opportunity of appearing before Parliament and opposing them if they think fit; *Lamb vs. North London Railway Company*, L. R. 4, Chan., Appl. Cas. 532.

I do not think there is evidence to warrant the conclusion that Mr. Barnes was the agent of the plaintiff in this transaction, the only communication between her and the arbitrators was the appointment of Mr Barnes as arbitrator when requested by them to make a nomination, and, considering how strongly

the courts condemn the double position even to the extent of looking upon arbitrators as acting corruptly if they act as agents or take instructions from either side, this ought not to be readily assumed,—*Russell*, 221 Ed., 1882,—especially when each of the arbitrators is required by the Railway Act to make oath before a Magistrate, and did so in this case “to do justice between the parties.” There is another point, and I believe it is the only one in which there is a difference of opinion between my brother Judge and myself, that is the contention of irregularity by the arbitrators who made the award in not giving notice to the plaintiff before a final determination *ex parte*. The mistake in this appears to have arisen from the belief that Mr. Barnes was the agent of the plaintiff, and that as such his acts and expressions were binding on her. Mr. McKay says there was but one special meeting on this inquiry, when some one attended for the plaintiff, but could not remember who he was, Mr. Barnes, arbitrator, was also present; and it does not appear that his authority was ever revoked by the plaintiff, even if that could have been done, which I think could not after he had been sworn as directed by the Act and entered on the inquiry. The award was made in his absence, a considerable time after the meeting referred to, without notice to him or the plaintiff at the time, although conversations on the subject had in the interim occurred between him and the other arbitrators. So far from his having withdrawn from the arbitration he asked the others to reconsider the award, which they declined to do, and he said the matter must go the Supreme Court. Now if the plaintiff had said this it would be quite a different position and might be regarded as a waiver of irregularity in not giving notice. My present opinion is it should have been given, *Russell* 677. Although I cannot say that if given the result would have been different or that the plaintiff has been prejudiced. If this were a good ground of objection to the validity of the award, I do not think it was necessary to file a bill in equity as was formerly the case, and that it might be pleaded under the Equitable Defences Act; *Russell* 550.

There is no imputation of unfair conduct of any kind that can be cast on the arbitrators who made the award, and there is nothing to impeach their competency or honesty in their estimate of the value of the land or otherwise. We both concur that judgment should be entered for the plaintiff.

The Sol. Gen., Mr. McNeily, Q. C., and Mr. Boone, for plaintiff.
Mr. Kent, Q. C., for the defendants.

1884, April. HON. MR. JUSTICE LITTLE.

Will—Construction—Bequest of Estate for life—Meaning of “issue” and “lawful issue.”

Where the testator made certain bequests to his daughters, limited, and conditioned, by the words “issue” and “lawful issue.”

Held—That the words “issue” and “lawful issue” must be read children, and not extended to remote issue, and that the grandchildren of testator cannot take with his children on the death of one of them holding an estate for life.

THIS matter comes before the Court in the form of a special case, submitted by the parties on both sides.

The contention arises out of the construction to be placed on the will of Geo. Winter, deceased, as regards those who are entitled to share the portion of the late Mary Saunders, a legatee, and a daughter of testator, under the following admitted statement of facts: Mary Saunders was widow of the late John Saunders, by whom she had five children, Louisa, Caroline, Isabella, Jessie and Maria, and by a former husband, Strachan, one child, William, who is deceased, (who left a widow and no children, the widow supposed to be dead.) Of the five above-named, there are living, viz.: Louisa, married to Heber Budden; Jessie, married to Wm. Budden; Maria, a spinster; Caroline predeceased her mother, the said Mary Saunders, leaving three children, one of whom only survived her, now wife of Ebenezer March, a defendant; Isabella, who married Wm. Budden, is also deceased, leaving a daughter now living.

The children living claim that the property bequeathed to Mary Saunders, their mother, for life, belongs to them as survivors since her death, which occurred in 1881. The defendants each claim a share of said legacy, either in their own right or as next of kin of said Mary Saunders, and the judgment of the Court is prayed as to the rights of the several parties under the will, and for such order and direction as the circumstances of the case may require.

The testator was Ordnance storekeeper in St. John's, and his will bears date the 11th of March, 1852, and a codicil thereto of the 5th March, 1856, both duly admitted to probate. The will and codicil are set out in full, and the parts to which our attention has been directed as bearing on the question for our consideration are “Fourth Clause.” “It is my will and intention, and I do direct that from and after the decease of my dear wife, Mary, (who had a life estate in all) the whole of my real

and personal estate, of whatever kind or nature, and wheresoever situate, (subject to the devises, bequests and conditions hereinafter mentioned), shall be divided into eleven equal shares, and distributed among my children and grandchildren in the following proportions, that is to say: one share each to my following named sons, viz., (4), one share each to my following named daughters, viz.: Mary, that is Mrs. Saunders, (and four others), one share in equal portions to my grandchildren, H. W. and L. Hanmer, issue of my late daughter, Susannah, and one share to my grandchild, C. Preston, issue of my late daughter, Elizabeth. Provided, that if either or all of my said grandchildren should die without *lawful issue* his, her, or their share or shares shall revert to the general estate to be divided in equal proportions between my sons and daughters now living or their heirs." "Seventh." "It is my will, and I do direct that the share of my estate above given to any of my said sons and daughters who may die, whether *before* or *after* the decease of my said wife, shall be distributed equally among the *children* of such sons and daughters so dying." Here follows a provision as regards widow or widower, "and in the event of the death or marriage of either the share of every such son and daughter shall go to and be distributed equally among any other sons and daughters then living *or their lawful issue*; &c., &c., &c., &c., &c. The share or portion given to daughters shall be to and for the sole and separate use and benefit of my said daughters respectively, and their *lawful issue*. The share or property hereby divided shall be preserved for the support of my said sons, their wives and *children*." It is further directed by this clause that the executors were required to convey to one or more trustees "for securing the purposes aforesaid, the respective shares or portions of my estate above given to my said sons and daughters respectively"; by the ninth clause testator directs that the shares given to sons and daughters shall descend to and be distributed equally among the *lawful issue* of every such son and daughter, the *children* in each case taking their parents share; by the tenth clause, "I do restrict and enjoin all my *children and grandchildren* from disposing of or departing with his or her share to a stranger, without first offering the same to some one or more of my *children or grandchildren* owning or having a share or interest in my said estate, &c." By the codicil, "What I leave my daughters shall be secured to them and to their heirs in the same manner and by the same terms as those expressed therein (the will) with reference to my sons."

From the foregoing clauses of the will of testator, his intention in reference to the final settlement of his estate can be easily gathered. It was to preserve and continue the property and the subject of the bequests in the different legatees, and, after their decease, to their "lawful issue," and, to more certainly secure this object, testator further required and directed his executors to convey to trustees the respective shares so bequeathed, and that such shares should descend to, and be distributed equally among, the lawful issue of his sons and daughters, &c. The intention of the testator being thus clearly manifest from the words and tenor of his will, we are bound to give effect to such intention so far as we can consistently with the principles laid down in such cases. We are of opinion that the case submitted for our decision is to be distinguished from *Byng vs. Lord Stafford*, 6 B., 558, and *Percy vs. Percy*, 24 ch. Din.; and we are of opinion the bequests to the daughters of testator and their lawful issue, limited and conditioned as they are in this will and its codicils, gave an estate for life only, and that the issue took as purchasers; (*W. Exrs. 1116, et parte Wynch, 5 Diges, M. & G., 188, L. Je. N. S. Vol. 25, p 624, Theobald on Wills, 260 and 373, &c., &c., &c.*)

Then as to the issue who are to take, we consider they must be confined to the children of the legatees; that the words "issue" and "lawful issue," regarded in connection with the context, must be read children, and not extended to remote issue; and that consequently, in this case the grandchildren of Mary Saunders do not take but those only of her children who survived her. The class has to be ascertained after death of the tenant for life; (*2 Ws. 1094, Fairfield vs. Bushel, 32 B. 158; and Drighton's settled estates, L. R's Ch, Dn. 2 Corries Will, 32 Biv, p. 426.*)

Let each party bear his own costs.

The Solicitor General for the complainants.

Mr. Emerson for the defendants.

1884, *June*. HON. MR. JUSTICE PINSENT.

Homicide—In defence of one's Parent.

Where it appeared that the prisoner, observing his father violently engaged in a row, which the latter had provoked, by drunken abusiveness and threats, and in which he was being seriously assaulted, struck at the party assaulting with his knife, which shortly deprived him of life.

The Court was of opinion—the grand jury having found a verdict of wilful murder—and the prisoner having pleaded guilty to the lesser crime of manslaughter—that the Crown was justified in accepting the plea; and abandoning the charge of wilful murder; and that the act having been committed in defence of a parent, was a mitigating circumstance.

“In the last Autumn term of this Court, a grand jury found a bill of indictment against you for the wilful murder of one George Mayo, at Burin, on the 29th day of September last.

“It appears that the families of Mayo and Hollett are related, and that they are the principal inhabitants of Pardy's Island, Burin.

“That on the morning of the day in question, your father Samuel Hollett, by drunken abusiveness and threats, provoked a row and disturbance in which the parties concerned became violently engaged, and in which your father was being seriously assaulted; then you interfered, and, making use of your knife, gave George Mayo a blow on the breast which shortly deprived him of life.

“The circumstances were such, particularly when explained, as to justify the grand jury in placing you upon your trial for murder; or they might have been reconciled with the less heinous crime of manslaughter.

“Such further light has been thrown upon the case since the finding of the bill and your arraignment, when you pleaded “Not Guilty” to the charge of murder, and such explanations on your behalf have been offered upon affidavit in mitigation of your conduct, that the Crown, pursuing a merciful and at the same time just and prudent course, consented, at your late trial, to accept your confession of the crime of manslaughter, and thus, upon your own confession, a jury lately found you guilty of this minor offence.

“You pursued a prudent and well-advised course in confessing to that extent to the charge of homicide.

“You made no difficulty at any time in regard to your apprehension, and indeed after that you voluntarily admitted to the Magistrate, that in defence of your father, who was being set

upon and beaten, you committed the act which deprived George Mayo of his life. These circumstances are to be taken very much in mitigation of your offence and its punishment; and we have had regard to the considerations put with so much force and feeling in your behalf by your learned counsel. It is a matter of deep regret that you being a man of good character, and whose conduct has been exemplary, as a prisoner, are suffering in great measure the consequences of your father's folly and misconduct; but there remains the fact that with great rashness and recklessness, in a transport of passion, to which the infirmity of human nature too readily yielded, you made use of a weapon, resort to which in a personal contest is abhorrent to the instincts and habits of British people.

"Your punishment must, therefore, be severe and exemplary, and the sentence of the Court is, that you be imprisoned with hard labor in Her Majesty's gaol at St. John's for the period of two and a half years from the 30th September last, the date of your arrest.

The Attorney General (Sir W. V. Whiteway), and Solicitor General (Winter), for the prosecution.

Mr. McNeily, Q. C., for the prisoner.

THE "J. L. MAYO."

1884, *August*. HON. SIR F. B. T. CARTER, C. J.

Shipping—Salvage—Meritorious services—Exclusion of master and crew from derelict by salvors—Salvage a maritime lien—Misconduct of salvors

The s. s. *Greyhound*, a part packet and part tug-boat, fell in with the *J. L. Mayo*, a fishing schooner, 64 tons, about fourteen miles from the port to which the *Greyhound* was bound, in an abandoned condition, dismasted, both cables out, drifting on the rocks. Volunteer crew went on board with difficulty, and by great care and skill she was taken in tow, and brought safely to Harbor Breton.

Held—That although time expended was of short duration, services were of meritorious character. That (1) Salvage confers a lien independent of possession; (2) Salvors in ordinary cases do not acquire sole management of the ship, they only act under sufferance; (3) In cases of derelict, the first occupants have exclusive possession; (4) If able unaided to save ship, salvors may prevent other salvors from interfering with them; (5) Salvors are bound to give up charge to the master on his claiming charge; (6) Gross negligence or misconduct of salvors may cause a forfeiture of all claim.

THIS is an action of salvage instituted on behalf of the owners, master and crew of the steam-ship *Greyhound*, of the burthen of 89 tons and 20 horse power, registered in London, England, with eight hands, including the master, against the schooner *J. L. Mayo*, of 64 tons, her cargo and freight.

The material circumstances connected with the salvage services rendered, were, that the *Greyhound* at the time was on a trip from Gaultois to Harbor Briton, in Fortune Bay, with passengers, in both of which places the owners have mercantile establishments; the steamer had left the former place on the morning of the 14th November last, having to encounter a heavy wind from the W. N. W. and a high sea; about 3 o'clock, p.m., they discerned a dismasted vessel with both cables out broadside to the wind and sea, apparently drifting towards the Shag-rocks, which were to leeward at the mouth of Connaigre Head, described as a very dangerous locality. The master was unwilling to order any of the crew to board the vessel thinking it unsafe to do so, when four of them volunteered, who were William Cooksly, mate, Joseph Cox and John Jensen, seamen, and William Buckland, steward; when they approached as near as was deemed safe, about three-fourths of a mile, these four got into a boat lowered from the steamer, taking a small line with them, one end of which was left on board with some difficulty attended with risk to life from the rolling of the vessel and the fear of her striking against the gunwale of the boat and swamping them, the wind blowing a gale and a heavy sea on, they managed to board on the leeward side; a five-inch hawser was then attached to the line and hauled from the *Greyhound* to the vessel, they found an anchor out on the port, not holding, but none on the other side, the rudder was gone a foot below the trunk and the vessel unmanageable; not having sufficient crew to haul in the cables they had no alternative than to cut them as ordered by the master. The *Greyhound* attempted to tow with the first hawser but not succeeding a second one was supplied from her by making a loop on it and putting into that a large piece of wood, used as a fender, which floated to the vessel and was hooked up by those on board, there was thus a tow-line from both bows when the steamer commenced to tow to Harbor Briton, a distance of twelve or fourteen miles, where they reached about 7 p.m., it was then raining and thick with the wind S.E., and almost a calm. Careful measures were adopted towards the securing the vessel, as it came on that night to blow a gale from the N.N.W. and three mooring warps were

necessarily and opportunely provided by the owners of the *Greyhound* for the safety of the *J. L. Mayo* with an efficient watch, relieved at intervals. The next day the same rough weather continued rendering it impossible for a sailing ship to have rescued the *J. L. Mayo*, if she had not been broken up before then as most probably she would have been by drifting on either the Shag-rocks or Connaigre head. The master of the *Greyhound*, Joseph Simms, deposes that in his opinion her anchors if aground could not have saved her next day as her cables were of hemp and could not have sustained the strain on them. The vessel was perceived from the shore on the 13th of said month with her anchors out and had drifted somewhat; there was then a heavy gale blowing, which continued to the 15th inclusive. The masts had been cut away and the vessel abandoned by the master and crew about 2 p.m. on the said 14th November. The rudder was gone, some of the sails had been blown away, and others torn in tatters by the force of the wind; the jibboom was gone, several of her boats or dories had been washed away, she having been previously engaged in the fishery as an American banker. It is found that the master and crew had removed all their personal effects, and nothing seen on board to indicate the expectation of returning, and to all intents and purposes she was a derelict. The master and crew were at Harbor Briton when the *Greyhound* reached there, having got there in a dory. It is deposed and uncontradicted that a steamer only could have effected the safety of the *J. L. Mayo*, and there was no other than the *Greyhound* on that part of the coast. After remaining some time in Harbor Briton the vessel was, by arrangement between the parties, towed to Saint Pierre by the *Greyhound*, and with the cargo safely delivered up to the consignees.

Mr. Greene appeared for underwriters, but did not examine any witnesses in the defence; the salvage services were not disputed, and the main question for the consideration of the Court is as regards the amount of remuneration for the services rendered.

From the cross-examination I infer there was an insinuation, but no distinct charge made, that the salvors had excluded the master and crew from the *J. L. Mayo* after her arrival at Harbor Briton; but I am satisfied from the evidence such was not the case. As some misconception appears to exist as to the relative rights of parties in cases of salvage, I think it advisable for general information to state that salvage confers a

maritime lien which exists independently of the possession, and ordinarily affords the best security for the payment of the claim. Lord Stowell, in the *Elenora Charlotte*, 1 Hagg, 156, says: "It is an ill-founded and absurd notion that unless salvors stick to the ship they forfeit, or at least impair their title to remuneration." It is an erroneous idea, but I believe a common one, that salvors going to the assistance of a vessel in distress acquire the sole management of her; they only act under sufferance and permission; their pretensions in claiming to decide what is to be the extent of assistance are quite unwarrantable—that is a matter not within their province. This has application to ordinary cases of salvage, and it is different in a case of derelict; there the first occupants may have a right to keep exclusive possession, and if they are able unaided to bring her to a place of safety, but not otherwise, they may lawfully prevent any other salvors interfering with them, and it must be understood that unless the vessel has been utterly abandoned and is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master on his appearing and claiming charge, and the master may then refuse to employ them, and may take what measures he thinks fit for the preservation of the vessel; *Williams and Brine, and cases cited*, p. 128.

It should always be remembered by salvors that misconduct or gross negligence on their parts may cause a forfeiture of all claim or diminish the amount of their reward.

The *J. L. Mayo* was on a voyage from Boston, U. S., to St. Pierre, with a general cargo.

The agreed upon value of the *J. L. Mayo's* cargo and freight is \$5,400, or £1,350 currency.

Although the time occupied in the performance of the actual salvage was not of long duration, yet the services were of a meritorious and efficient character. There is no hard and fast rule which controls the Court in estimating the amount of compensation in a case of derelict, as I consider this to have been, any more than in other cases of salvage, as every case must depend upon its own peculiar circumstances.

When the services have been rendered by a steamer, and that promptly as in this case, the Court has been more liberal in its award than when otherwise; and, having regard to the elements which enter into the consideration of the Court in salvage claims and the special circumstances of this case, as I can have no reasonable doubt that a valuable property would

have been lost but for the timely intervention of the salvors, I think that \$1,680 would be a liberal and fair amount to award, which amount I decree to be paid to the plaintiff with costs.

If the parties, plaintiffs, do not agree between themselves in the apportionment, I shall do so on application, counsel for plaintiffs stating to the Court the scheme proposed.

The Hon. J. S. Winter, Q. C., (Solicitor General), Counsel for plaintiffs.

Mr. Greenc, Counsel for defendants.

Solicitors:—*Winter and Morison; Greenc and Bunting*

(1.) POWER *v.* KENNEDY; (2.) KENNEDY *v.* POWER.

1884, *September*. HON. MR. JUSTICE PINSENT.

Trover of Seals, on ice fields—Rights of property in Round Seals.

Where the crews of vessels distributing themselves over large areas of the ice fields, indiscriminately slaughter seals as they go, leaving them round, taking no heed to collect, or mark, or pan, the same.

Held—No right of property is acquired in the said seals. The killing must be accompanied by possession; the finder of the body of a seal, without any *indicia* of property, is the owner of the same, unless the party claiming as of right, against him, be in a position, then, and there, to assert his right of property, point to the specific seals, and exercise corporal control over them.

THESE cases were tried together in the last term of this court before the Chief Justice, and were reduced to a question of claim and counter-claim.

The plaintiff in the case numbered (1) first took his action to recover from the defendant, Kennedy. (plaintiff in the case numbered 2), the value of some thousands of seals said to have been wrongfully taken at the last spring's seal fishery.

Then the plaintiff, (Kennedy) in the second case, sued Power in a similar action.

Power commanded the s. s. *Narwhal*, (Dundee Sealing and Whaling Company), Kennedy the s. s. *Vanguard*, (Messrs. John Munn & Co.'s).

As is frequent in such cases the evidence appears to have been of the most conflicting description, and is in great part utterly irreconcilable with truth and fact on one side or the other, and is possibly opposed to the truth in several particulars on both sides.

It would not, therefore, as a rule, be considered advisable to interfere with the verdict of an intelligent and competent jury, whose duty it was to discriminate so far as they could between the false and true, and if it were not for the peculiar circumstances of this case, I should not be inclined to depart from the usual rule of leaving the determination of fact to those whose function it is to pronounce upon it.

Here, however, arose a question, especially in action No. 2, affecting the right of property in "round seals," and upon which there has hitherto been no specific and generally understood declaration of what the law is.

To the great surprise and disappointment no doubt, of the plaintiff, in the first action the jury found a verdict for the defendant in that suit, and in the second action a verdict in favor of the plaintiff of \$1,800, and this mainly turned upon the appropriation of, as is alleged, the round seals.

Speaking of the understanding or usage of the seal fishery some witnesses appear to have expressed their opinion that "there was no law for scattered round seals."

In my judgment this language, taken as it was intended to be understood, roughly conveys what the law is, and what the usage or custom of the business should be; and I think that evidence of such a usage, it being a reasonable one, may be given; and that such usage will control and qualify the rights of parties engaged in the common prosecution of the so-called fishery.

We know that in the whalefishery, for instance, such usages prevail and the law gives effect to them.

I am of opinion that no right of property is acquired by the mere indiscriminate slaughter of seals; that it would be monstrous for the law to support a claim of right to scattered round seals on the part of ships, the crews of which distribute themselves over an area of some miles, and for the purpose of preventing competition and anticipating the arrival and active participation of others in the fruits of the ice-fields, kill as they go with the blow of a gaff, taking no heed to collect and pan and mark their spoil, reserving all care in these respects, until as they believe or profess, and, as in this case assert, they have left no accessible seals alive.

The evil becomes aggravated when more crews than one contribute, to the confusion that must necessarily arise from so reprehensible a practice, which is open to the further most serious objections that seals deteriorate from being left to harden

and freeze upon the ice before "sculpting"; and that large numbers are forever lost to the common stock

I admit the general proposition that property may be acquired and retained in "round seals," as well as in "sculpted seals," and by similar means; but I hold that the killing must be accompanied by possession, and that when the next comer finds the body of a seal or the bodies of seals on the ice without any accompanying *indicia* of property, the man who claims as of right against him must be in a position then and there to assert his right of property, to point to the specific seals as his own or those of his fellows, and to exercise corporal control over them, unless he is resisted by force or deterred by threats of violence.

Except under such circumstances I am of opinion that the killer must be held to have left or abandoned the dead round seals, to the next finder who shall possess himself of them.

Regarding the evidence as it has been described to me in these cases, I think the jury may have labored under a grave misconception of the legal rights of parties, and may and probably have found a verdict which can not be justly supported in amount.

On a view of both the cases I am of opinion that there should be rules for new trials, unless the plaintiff in the second action (Kennedy) consents to reduce his verdict to at least the sum of \$120. If he should so consent then that the rules for new trials should be discharged costs between party and party following the judgment.

Mr. McNeily, Q. C., and Mr. Kent, Q. C., for Kennedy.

Solicitor General (Winter) and Mr. Boone, for Power.

ESTATE LATE CHARLES FOX BENNETT.

1884, *December*. HON. MR. JUSTICE PINSENT.

Will—Holograph—Construction of—Apportionment of annuities—Supplying words to perfect bequest.

The testator left an annuity. The annuitant died within the first year.

Held—That his estate is not entitled to any portion of the annuity, as annuities cannot be apportioned. Imperial Act 4 Wm. IV., c. 22, which provides for apportionment of annuities, does not apply to Newfoundland.

Held—That where a clause is imperfect and unfinished, and testator's meaning is obvious, the Court will supply the words to perfect the bequest.

THE questions raised for determination in this case come before the court upon the petition of the executor, Mr. Thomas R. Smith, praying for directions, and upon hearing Mr. Greene, of counsel for him, as well as for all the parties interested in the adjudication, except the representatives of Mr. Thomas Hutchings, who appear by the executor in person.

The question in which the estate of Hutchings is interested turns upon the construction of the following clause of Mr. Bennett's will :

"I give to my old friend Thomas Hutchings, now employed in my Brewery establishment, one hundred pounds currency, to be paid to him annually during his natural life."

Mr. Hutchings died eleven months and a half after the testator (Bennett), and we are asked to determine whether the estate of the former is entitled to receive, under the bequest in question, the whole or any part of one hundred pounds which, but for the death of Hutchings, would have represented the first year's annuity.

We are, with reluctance, constrained to hold that no part of that sum is payable by the estate of Bennett to that of Hutchings.

Prior to the Imperial act 4 Wm. IV, c. 22, it had been long held that annuities could not be apportioned, and moreover that annuities not expressed to be otherwise payable were not payable until the end of the year.

The Imperial statute referred to provided for apportionment of annuities and such like sums, in proportion to the time which had elapsed from the commencement of the allowance : but as that act was passed after the establishment of our local Legislature, and its provisions have not since been incorporated with our local law, the court is obliged to determine this case upon the principles of the old law, and to hold that neither the whole nor any part of the first hundred pounds had become payable to the annuitant, and that therefore his estate possesses no interest in it.

The next and principal question now submitted to the court is this : whether the female children of Sophia Stonhouse, deceased, are entitled to claim under Mr. Bennett's will, and the difficulty arises in this way :

The will is holograph (*i.e.*, wholly in the handwriting of the testator himself) ; he makes a bequest of the residue of his general estate to be divided and distributed amongst eight several

relatives, and to his "friend and partner in trade, Thomas R. Smith," "one-tenth part each,"—and the bequest proceeds thus:

"To Josephine Brettingham, the sister of my wife, one-twentieth part; and to the female children of my wife's late sister, Sophia, late the wife of the Rev. Arthur Stonhouse"——

The clause is clearly imperfect and unfinished, but in the opinion of the court, after giving the matter careful consideration, the testator's meaning and intention are obvious, viz.: that the female children of Sophia Stonhouse are entitled to one-twentieth part of his estate, similarly to their aunt Josephine Brettingham.

The will itself bears intrinsic evidence of this, for nine-tenths of the residue are disposed of in the first part of the bequest to the legatees there named; next one-twentieth to Josephine Brettingham; and then follows the legacy to the children of Sophia Stonhouse, which if carried out in the same manner would dispose of another twentieth, thus making in all the ten-tenths of the residue manifestly intended to be disposed of.

The court has no hesitation therefore in supplying the necessary words to perfect the last bequest. The case of *Redfern v. Bryning*, (2 R. 6 Chancery. 133,) is a case in point in which the court required to go much further than is necessary in this case to supply an accidental omission

BROWN v. COLEMAN.

1884, December. HON. MR. JUSTICE PINSENT.

Sub-contract—Erection by tender based on plan—Warranty as to the nature of site—Allowance for extras.

Where a party subcontracted to erect a lighthouse according to plans and specifications submitted, and it was afterwards found that there were greater undulations and inequalities in the ground than could have been gathered from the plan, the contractor having taken this risk. The subcontractor found it necessary to put in extra work to complete contract. In an action by the subcontractor the jury refused the extras. On a motion to set aside the verdict on the grounds that the plan did not show the inequalities, and must be taken as part of the contract—

Held—That the plan was part of the contract only in so far as it was expressly referred to and incorporated in the terms of the contract. That unless there was something in the character of the ground of an unusual and extraordinary kind which should have been brought to the notice of the sub-contractor, he must be held to have taken the risk.

In this action the plaintiff sought to recover a sum of about \$1,300 upon a claim for extra work arising out of a contract to build the stone and brick work of a light-house at Gull Island, on this coast.

The defendant had taken the entire contract for the erection of the structure from the Board of Works, and had tendered for a sub-contract for mason work, and he accepted the plaintiffs' tender for \$1,400.

The case was heard before me with a special jury, and the jury found a verdict for the plaintiff for \$226 upon two of the items charged as extra work by the plaintiff, viz., upon leveling sixty feet extra of covered way and excavating the basement. Of that finding I fully approve, but the plaintiff, not satisfied with the amount of the verdict, seeks for a new trial because of his failure to recover upon other charges, which failure he attributes to misdirection by the judge and to a finding by the jury contrary to evidence.

The plaintiff's counsel contends that a plan which was admitted in evidence formed in all particulars a part of the contract, and moreover that it binds the defendant to a warranty or representation that the undulations or inequalities of the ground upon which the light-house keeper's dwelling house was to be built were no greater than would be suggested by a transverse section of the building exhibited on the plan.

At the point of this transverse section on the plan no great inequality is thereon. In the result the wall had to be built from a depth of six feet from the ground to the floor at one extreme and so occasionally at different points, but only six inches from the ground (where there was solid rock) to floor in the other extreme; the plaintiff not being required at that point to build the height of eighteen inches provided by the contract, the rock taking the place of wall.

I differed from this contention and held that the plan was part of the contract in the particulars and in which it was expressly referred to, and incorporated with the terms of the contract.

In several matters this was so. In those in which the plaintiff failed to recover it was not so, and the jury in delivering their verdict expressly said that on these points the plaintiff had not made a case but had taken the risk of the ground.

The part of the contract on this point ran thus: to build the foundation walls of houses, porches and covered way of the thickness shown on the plan and of the height necessary

to bring the ground-floor of the house eighteen inches above the level of the ground at the highest point of the latter.

It will be observed that the thickness, which was two feet, is expressly stated to be shown on the plan; and then as to the height, that was to be what was necessary to bring the ground-floor eighteen inches above the higher point of the ground; language clearly providing for contingencies and for differences of grade in the ground, no reference being made to the plan in the clause beyond the thickness of wall.

No figures are given in the plan to show the depth of and differences in the inequality of the ground from which up to the ground-floor the wall was to be built.

The contract simply provides that whatever the highest point may be, the wall is to be eighteen inches above it.

Upon other points, heights and dimensions are marked on the plan.

The defendant had taken his risk of the ground with the Board of Works, and insists that the plaintiff did the same in regard to him.

Neither of the parties to the action had taken the precaution of inspecting the locality, but the plaintiff is shown to have made some enquiries of persons who had seen it, and apparently to have been satisfied that he might take the contract with safety.

Moreover, the plaintiff swore, "I provided for a rough place, but not for such inequalities. The defendant's own estimate was much the same as mine"; and he said he did not charge the defendant with any wilful misrepresentation or concealment.

I directed the jury that unless there was something in the character of the ground of an unusual and extraordinary kind not improbable to be found in a site chosen on this coast and in such a locality for a light house, and which should have been brought to the notice of the plaintiff, the plaintiff should be considered as having taken the risk of the work and not to have made out a claim for extra work on this part of the contract.

That the plan in this respect was not part of the contract, but only evidence in the case.

The jury found as I have already described. I am quite satisfied with their verdict, and I am still of opinion that there was no misdirection as against the plaintiff; that if there was any error in this respect, it was in leaving any question to the jury upon these particulars of the plaintiff's claim; and, there-

fore, that the rule *nisi* for a new trial should be discharged with costs.

Solicitor General (Winter), for plaintiff.

Mr. Kent, Q. C., for defendant.

SOMMERVILLE v. BRIEN.

1885, *February*. BY THE COURT.

Pleadings—Incomplete administration must be pleaded—Not ground for non-suit.

In an action of trover incomplete administration was put forward as a ground on a motion for a non-suit.

Held—That want of perfected administration should have been pleaded and not as a ground for non-suit.

THIS action was brought by Margaret Sommerville, administratrix C. T. A. of the estate of the late Cornelius Brien, to recover possession of certain boats, nets, household furniture and other chattels forming part of estate, valued at two thousand dollars, and alleged to have been taken by defendants and converted to their own use.

A demand had been made on the defendant, Cornelius, who, on his examination proved that none of the chattels had come to his hands or possession. The other defendant, Michael, had carried on the fishery for many years in conjunction with testator, as a partner. A motion was made by defendant's counsel for a non-suit on the grounds that the letters of administration were still incomplete and imperfect, and plaintiff was not entitled to sue in the character of administratrix; that defendant, (Michael), was shewn to have been a partner of testator's, and could not be proceeded against in this action; no evidence of conversion. In reserving these points for a non-suit the court observed that the want of a perfected administration should have been specially pleaded, and the objection could not now be allowed. Defendants proceeded with their defence and proved that defendant, (Cornelius), never had possession of the goods and chattels sued for; that Michael had been a partner, as alleged, and that for debts contracted during testator's lifetime, the boats had been taken over by the supplying merchant. The court gave judgment for defendants.

1885, *April*. BY THE COURT.

Mandamus to Inferior Court to complete papers and grant appeal.

Where it is shown to the satisfaction of the Court that an inferior tribunal has adjudged against a party and where an appeal lay, refuses to complete the necessary papers and grant the appeal, the Court will direct a mandamus to issue ordering the record of the Court below to be sent up for hearing.

Mr. Carty shewed cause to a *rule nisi* obtained by Mr. Emerson for a mandamus to be directed to Judge Prowse, of the District Court, on the grounds of alleged refusal to complete the necessary papers and grant an appeal in a judgment stated to have been given by him in this case in the court below.

From the circumstances set out in the affidavits, and now moved on by counsel, the court considered the plaintiff had complied with all necessary preliminaries, and shewed sufficient grounds to entitle him to have the record on appeal sent up for hearing, and made the rule absolute accordingly.

IN THE MATTER OF THE WILL OF THE LATE ROBERT
ALEXANDER, MERCHANT.

1885, *April*. BY THE COURT.

Will—Petition of Executor for directions—Application of bequest—Misdirection of Legatee.

Where the testator made a bequest to a society, and it was found no society exactly corresponding to the designation given by the testator was known.

Held—If the society is misdescribed, the Court will if possible, discover from surrounding circumstances, what society was intended. The Court will admit extrinsic evidence to determine what the testator's words express. Evidence to show that the testator subscribed to a particular society will be admitted, to show what was in his mind when he made the bequest.

THE executors on two separate petitions and substantive motions, sought for directions and the order of the court as to the manner in which they were to execute and carry out certain bequests contained in the will of testator; and in reference to their first petition and the motion thereon, the court delivered the following directions in writing:—

The executors by their petition ask for the order and directions of the court for their guidance in relation to the following bequest contained in the said will, viz.:—"I will and bequeath

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to the institution known as the Colonial and Continental School Society, the sum of Five hundred pounds currency."

They set out in this petition that there is no such society of that name in this colony; in the year 1862 there was a society called the Colonial Church and School Society, the head office being in England, having a branch society or committee in this colony; in that year the society in England changed its name to the Colonial and Continental Church Society, a branch whereof was formed and incorporated in this colony under the name of the "Saint John's Association in aid of the Colonial and Continental Church Society," and at present is supporting and conducting schools in this colony.

This "Association in aid, &c.," claim that said legacy was intended for and bequeathed to the Saint John's Association, or to the said Colonial and Continental Church Society.

The said executors therefore ask to be directed as to the application of this bequest, whether it should be paid over to the Parent Society or the Association.

Very little difficulty exists in complying with prayer of this petition as the authorities are clear and definite in the course to be adopted by a court under such circumstances.

In *Theobald on Wills*, p. 297, it is laid down,—“if the society is misdescribed, the court will, if possible, discover from surrounding circumstances, &c., what society was intended. *Wilson vs. Squires*, 1 Y. & C. C. 654; *Bunting vs. Marriott*, 19 B. 163, &c.; and in 12 L. R. E. C., in *re Kilverts Trusts*, where in a gift (or bequest) to a charity, the object of the gift is imperfectly described, and uncertainty in consequence arises, evidence of the donor having subscribed to a particular society is admissible to shew what was in his mind when making the gift or bequest.”

In this instance the court obtained extrinsic evidence to determine what the testators words express and what meaning should be applied to them.

It appears the statements in the petition are perfectly correct, that there is no society so-called as “The Colonial and Continental School Society,” but there is “The Colonial and Continental Church Society,” which in 1861 took the place of the Colonial Church and School Society, and at the time of the execution of the will and now exists. The institution was established in London, and there is in this colony in connection with this society an association incorporated by local Act, 25 Vic., cap. 11,

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entitled "An Act to Incorporate the St. John's Association in aid of the Colonial and Continental Church Society," which association is subject to the control of the committee of the parent society in all its proceedings.

It was also satisfactorily shewn that the testator had been a supporter and regular subscriber to the funds of the Colonial and Continental Church Society.

Under the circumstances there can be no doubt of the correctness of the conclusion arrived at by the court, viz.:—That upon the face of the bequest the description of the particular society, was inaccurate and imperfect, and the evidence enables the court to decide that the legacy should be paid to the Colonial and Continental Church Society.

The association referred to is only auxiliary to the parent society, and not entitled to receive this legacy independently of it, nor without its express sanction.

The other matter connected with the estate is sub judice.

IN RE SMITH MCKAY.

1885, April. BY THE COURT.

Insolvency—Confirmation of Deed of Composition after declaration of Insolvency.

In 1882 the insolvent was so declared, and a certificate and final discharge granted. In 1883 a Deed of Composition was entered into. On a motion to confirm this deed and transfer all property in the hands of the trustee to the insolvent, the court intimated that the motion was unprecedented, and it would require undoubted proof of its authority to make such order.

THE Solicitor General, on behalf of Mr. McKay and the trustees, on a special affidavit setting out the facts, moved that an arrangement made in 1883 with certain creditors of the insolvent for a composition, and embodied in a deed executed by them, might be confirmed and given effect to by the Court; also, that the trustees be relieved of any further liability, and that the remainder of the insolvent estate, if any, in their possession may be revested in the insolvent.

Counsel was subsequently desired to amend the papers referred to on the motion before the application would be finally determined. The court intimated that a certificate of insolvency and final discharge had been granted in 1882, and a

motion of this nature was unprecedented under our insolvency laws, and it should be clearly shewn the court had undoubted authority under the statute to grant such an order as that moved for. Time was granted to enable counsel to perfect the necessary papers for a further hearing.

IN RE JOSEPH DROVER.

1885, *April*. HON. SIR F. B. T. CARTER, C.J.

Intestate Estate—Moneys in Savings' Bank in accounts of various names.

Where a party dies intestate having moneys deposited in Savings' Bank in the names of different parties.

Held—That there was a clear gift to each of those named for whom the deposit was made, and such amounts did not form part of estate as assets for distribution.

THE questions in this matter are raised upon the petition of Thomas Drover, brother and administrator of the estate of the deceased, asking for directions in the distribution of assets.

It appears that the deceased died on the 10th March, 1883, intestate, leaving him surviving his widow, Elizabeth Drover, and no issue, but as next of kin the petitioner and two sisters, Susannah married to John Young, and Mary, married to Geo. Lundrigan, and that the deceased had during his lifetime, at various times between 1856 and 1877, and thence undisturbed, made deposits in the Newfoundland Savings' Bank of sums of money in the names of certain relations, which in the aggregate, with accumulated interest, amount to \$1,449. These relations are, 1st, Susannah, a sister aforesaid; 2nd, Mary Ann, daughter of petitioner and neice of intestate, who was married to Albert Young, who survives, but the said Mary Ann has died since the death of the intestate, without issue; this deposit was made before marriage, in her own name; 3rd, Emma, another daughter of petitioner, married to Archibald Young, both living; this deposit was also made before marriage, in her own name; 4th, Joseph Drover Young, son of said Emma, of the age of eight years, grandson of petitioner and grandnephew of intestate; 5th, Elizabeth Drover, the widow of the intestate. There is also deposited in the Bank by the intestate in his own name, a sum which now amounts to \$273.47.

Counsel were heard for the respective parties interested, and several cases cited bearing on the points in issue.

The principal question for our direction is with reference to the deposits in the Savings' Bank, and we think that in accordance with the decision of this Court, pronounced by myself in 1880, in which all the cases were considered on a question substantially the same as regards deposits in the Savings' Bank by a deceased person, there was a clear gift to each of those named, for whom the deposit was made, and that none of these amounts form part of the estate of the deceased Joseph Drover as assets in the hands of the administrator for distribution. The deposit in the name of Mary Ann Drover or Young, aforesaid, is claimable by the husband, Albert Young, in his marital right, on his taking out letters of administration, and the deposit in the name of the intestate and all other his effects are to be distributed among those entitled under the Statutes of Distribution. The costs to be paid out of the estate.

Mr. McNeily, Q.C., for petitioner.

Mr. Kent, Q.C., for relatives.

HARRISON *v.* NEWFOUNDLAND RAILROAD CO.

1885, *April*. PINSENT, J., CARTER, C. J., LITTLE, J.

Chose in action—Requisites in Plea of assignment of—In action for.

Where judgment was obtained in a Foreign Court, the party obtaining the same sued upon it. The defence set up was that the judgment had been assigned before action brought, and notice given defendants of such assignment and claiming the amount of the judgment. The plea did not set out the names of the assignees.

Held—On demurrer, that the plea was bad, in that it should have disclosed the names of the assignees. The debtor should be apprised to whom he is to make payment.

THE plaintiff in this action seeks to recover the amount of a judgment alleged to have been recovered by him against the defendant Company in the Supreme Court of King's County, in the State of New York, U. S., for the sum of \$16,570.

The Company, in one of its pleas, sets up as a defence to the plaintiff's claim that there had been an assignment of the judgment by the plaintiff to one Henry Eichbourn, who had assigned to one Carter, and he again to one Platt, of which assignments the last named assignee had given the defendant Company due

notice in writing; and that Platt claims to be the sole owner of the alleged judgment, and of all rights thereunder; and the plea alleges that a judgment of this court in favor of the present plaintiff would be no bar or defence to any claim by the assignee against the Company.

The plea in question further sets out—

“That in relation to the subject-matter of this suit and arising out of the judgment now sued upon, there is now pending in this court proceedings in another action against the now defendants, at the suit of one Margaret Valentine, who also claims to be an assignee of all the rights and interests, claims and demands, of the now plaintiff upon or to the now defendants, under and by virtue of the said judgment, in the right of a conveyance thereof duly executed by a receiver of the said judgment, appointed by the city court of Brooklyn, in New York aforesaid, such city court being a court having jurisdiction in the premises. And these defendants further say that, there are now pending in the said supreme court of King's County proceedings instituted by the said Margaret Valentine, for the purpose of determining who is or are the party or parties entitled to have and receive the benefit and advantage of the said alleged judgment; and also, that the said alleged judgment of the said court of King's County, in the case of the now plaintiff against the now defendants, and the proceedings upon which the same is founded, are still pending in the said court by way of appeal to the general term of the said court, which appeal is still undecided,” etc.

The plaintiff, by his attorney, demurs to this plea as being bad in substance and insufficient in law; and it is contended that the allegation of the assignments is not made with sufficient certainty; that it does not appear that the assignments were absolute and for good consideration, or that the original assignment may not have been as a security for a less sum than the judgment.

It is further contended that the latter part of the plea, setting up proceedings at the suit of one Margaret Valentine, is inconsistent with the first part, and is, moreover, vague and uncertain; and that the alleged pending proceedings by and on her behalf are no bar to this action.

With regard to the exceptions taken to the first part of the plea, setting up the assignments and notice thereof, this court is of opinion that the plea is sufficient. It charges that the plaintiff assigned *all his right, title, and interest in, and claims and demands* in and upon, the judgment and the causes of action, and that the assignment was and is of full force and effect.

If this be not so, it is for the plaintiff to deny and prove it, and if he have any equities undisclosed, to assert them in another way.

Upon the objections taken by the plaintiff to the second part of the plea, relating to Margaret Valentine and her proceedings, this court holds that it is repugnant to the defence set up in the former part of the same plea, and that the statements are, moreover, in themselves too vague and indefinite to be of any avail as a defence; they set up a *claim* only in a third person, derived in some obscure and undefined manner, and in any case would appear to set up matter rather going to a stay of proceedings than containing a defence in bar of this action.

The demurrer must be disallowed to the first part of the plea, but allowed to the second. In other words, the latter part of the plea ought to be struck out.

SIR F. B. T. CARTER, C. J.:

By our Act 43 Vic, cap. 12, sec. 3, following the English Act, an assignee of any debt or other legal chose in action may sue for the same, conforming, of course, to the requirements of the Act in this respect: *Provided that express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignee would have been entitled to receive or claim such debt or chose in action.*

The Solicitor General, for plaintiff, cited *Jefferies v. Day*, 35 L.J., Q. B. 99, and *Watson v. Mid Railway Co.*, C. P. 285, bearing only the notice of the assignment, &c.

The defendant Company allege that they have had formal written notice from the *parties claiming*; but these parties, if there ever were any such, are not named, and the absence of which I regard as a substantial defect in the plea. In the cases referred to the assignees were named, and it stands to reason that a notice leaving out the principal part is nothing better than a mere blank. The Act requires *express notice in writing* shall be given, and that notice ought to be of such a character, at least, as to apprise the debtor of the person to whom he is to make payment and who can alone effectually give him a release therefor. If this were not so a plaintiff would be greatly delayed and embarrassed by an allegation which may have no foundation in fact, and which, if true, the defendant ought to have no difficulty in supplying when he is relying on a *bona fide* defence to the plaintiff's action. The defendant, by his plea, refers to pending proceedings in this Court by an alleged assignee of this same debt; but, so far, this can be regarded only as *res inter alios acta*. The only other plea is never indebted

and none impeaching the judgment. If, therefore, the object of the defendant Company is to pay the debt without being harassed by conflicting claimants, the section of the Act referred to provides for their relief if they are disposed to adopt the prescribed course. There is nothing shewn to warrant the Court in granting an injunction against further proceeding in this action.

I regard the plea in its present form as substantially defective, and should be set aside.

HON. MR. JUSTICE LITTLE:

The plaintiff's counsel, in support of the rule cited *Jeff v. Day*, 35 L. J., Q. B. 99, 36 L. J., Q. B. p. 285.

Our local Act 43 Vic., cap. 12, sec. 3, provides "that an assignment of any debt or legal chose in action, of which express notice was given to the debtor, shall be effectual," &c.

The principle of an assignment of such chose in action recognises three parties, the assignor, assignee and the debtor; and the latter to be bound must have notice of the assignment: *Deralc vs. Hall*, 3 Russ., 1 T. R., 4 C. P. 660. It is further declared that it is a proper equitable plea, "that the plaintiff assigned the debt to B, who gave notice to the defendant, and that the assignment still remains in full force"; *Jeff vs. Day*, L. R., Q. B. 372.

The defendant company allege they have received due notice of the assignment they refer to in their plea, and should have had no hesitancy in alleging or setting out the particulars of such facts as may be within their knowledge.

The plea as it stands is embarrassing and not sufficiently particular, and I consider the plaintiff should be informed of the name or names, or assignee or assignees, of the debt, and that the plea should be accordingly amended.

The rule obtained by plaintiff's counsel makes no reference to the action of Valentine pending in this court on the alleged assignment of the judgment referred to, consequently it is unnecessary, at present, that any reference should be made to it.

The Solicitor General (Winter), for plaintiff.

Mr. Kent, Q. C., for defendants.

1885, *June*. CARTER, C. J.; LITTLE, J.; PINSENT, J.

Arbitration—Award—Owner of land acting as arbitrator—Effect of to set aside award.

Where under a Railway Company's charter the Government were required to find the right of way through private property. The charter of the company provided for mode of arbitration. An owner of land through which the line passed acted as his own arbitrator. The Government arbitrators made an award to which the owner refused to subscribe. The company entered on the land. In an action for trespass the company pleaded as title the award. Reply—that owner, having acted as arbitrator and being interested, the award was void.

Held—By a majority of the judges (Pinsent, J., differing), that the objection of interest was one which the other side had waived and might waive; that the owner could not take advantage of his own wrong and repudiate his own deliberate act. The objection to interest only applies to a concealed interest, here it was open and known before the submission to arbitration was made.

THIS is an action of trespass to recover damages for entering upon the plaintiff's land, destroying crops, &c. The defendant Company, 5th plea, to which the plaintiff has demurred, professes to justify the alleged trespass under their contract with the Government and Act of Incorporation, 1881, which requires the Government to provide the necessary lands for the railway when it runs through private property and to make compensation therefor to the owners. For ascertaining the damage occasioned to any such owners the Governor is authorized to appoint two arbitrators and the party interested a third, any two of whom are to determine the amount of compensation. But should the party refuse or neglect to appoint an arbitrator within ten days after notice to that effect from the two, then these two may appoint a third, and the award of any two shall be binding; provision is also made for the arbitrators to be sworn to do justice, before a Magistrate, which it is alleged the two were.

The plea sets out *inter alia* that the Governor appointed two persons, and the plaintiff took it upon himself to act and did act as a third person, to determine the amount of compensation, if any, to be paid to the plaintiff for the damages; that the arbitrators took upon themselves the said arbitration, and the award in writing of two of them was duly made respecting the matters referred to, who thereby awarded to the plaintiff \$823.20 in full satisfaction for the damages alleged, which amount was tendered and offered to the plaintiff by the Government, who have

always been and still are ready to pay the same to the plaintiff, but that he has refused to accept it. That the defendant Co. lawfully entered upon the said land and were in possession as their freehold. The plaintiff contends the plea is defective in law as it does not shew that the plaintiff was properly constituted an arbitrator under the Act, and that the plaintiff being so interested, it does not shew that the Government assented to his acting as arbitrator.

There is no impeachment of the conduct of the two arbitrators, and the substantial question is whether the plaintiff, not having appointed a third person, and having at his own request, as it may be fairly inferred, although the averment is not distinctly set forth, acted for his own interests with the other two, and he not concurring with them in the amount awarded can now take advantage of his own act and have the award set aside as an invalid instrument and not binding on him. If that be so, inasmuch as this court has decided that the making compensation should precede the acquisition of the land by the defendant Company, they would be trespassers and liable to some damages, although the full compensation could only be ascertained by the mode prescribed by the statute, viz., arbitration, or more properly valuation or appraisement, as there is no question beyond that between the parties.

An arbitrator ought to be indifferent, but if has interest the objection applies only to concealed interest; for if the interest be well known to the parties, for instance if they refer to an owner of lands a question respecting the mode and expense of making a drain which will benefit the arbitrator's own estate, the award is good notwithstanding,—*Drew vs. Drew*, *H. L.* 1855, *Russell 116 Ed.*, 1882.

It has been said, a party cannot be a judge in his own case, but if his opponent consent to his deciding the question between them, the courts will not allow an objection afterwards—though he decide in his own favor. *Russell*, 117, *Matthew vs. Ollerton*, 4 *Mod.* 226; *Elliott vs. South Devon Railway*, 2 *DeGee and S.* 17 *S. C.* There is no particular class of persons from which an arbitrator is to be selected, *c. g.* a Justice of the Peace, &c., as is sometimes the case.

Upon the question of assent by the Government to the plaintiff acting for himself, it will be observed that by the Act, in the event of the party not appointing an arbitrator, the two others, and not the Government, are empowered to name one for him, and they apparently gave their assent to

the plaintiff's nomination of himself and, it is averred, acted with him; there was, therefore, no necessity for obtaining the assent of the Government, and as to that, if required, the plea states in accordance with the Act that the compensation was payable by the Government and that it always was and still is ready and willing to pay the same to the plaintiff as so awarded. If this be true, and we must assume at present that it is so, there was the subsequent sanction of what was done, and this as a general proposition may be considered the same thing in effect as assent at the time in accordance with the well known legal maxim, "a subsequent ratification has a retrospective effect and is equivalent to a prior command"; (*Broom 867.*)

The plaintiff not having appointed a third person, and having made his election to act, and acting for himself with the apparent assent of and in conjunction with the other two at the time in estimating the amount of compensation, it appears to me that it would be unjust to permit him to repudiate his own deliberate act, and thus to render the defendant company responsible in damages for a tortious proceeding occasioned by himself. There is no principle better established in law than that a man cannot take advantage of his own wrong, if that be so in this case. No doubt he considered that his own interests would be best subserved by the course he adopted in waiving his right to have another party besides himself for the determination of the question.

As an instance of the effect of waiver I may refer to the case cited by Mr. Kent at the bar, of *Wakefield Local Board of Health vs. West Midland and Great Grimsby Railway*: The Railway Clauses Consolidated Act (8th Vic, cap. 20, sec. 3), enacts that the word Justice shall mean a Justice of the Peace acting, &c., and *who shall not be interested in the matter*. A Justice interested did act without objection at the time, and on appeal to the Queen's Bench on this point Chief Justice Cockburn says: "Besides it was an objection which the parties might waive, and, even though in the first instance objection might have been taken to the Justice's jurisdiction according to the ordinary rule, if the parties did not do so, but went on taking the chance of a decision in their favor, nothing is better settled than that they cannot turn round afterwards and try to take advantage of the original objection," and he declined to entertain it.

In this issue in demurrer the Court is bound by the Common

Law Procedure Act, adopted in our Consolidated Statutes, to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form.

I am of opinion the defendant company are entitled to judgment in their favor, and adjudge accordingly.

HON. MR. JUSTICE LITTLE:

The Statute, by virtue of which it is stated these proceedings arose, is the 44th Vic., cap. 2, entitled "An Act respecting the Newfoundland Railway," and empowers the defendant Company to enter on and take lands of individuals for the purposes of the Railway, and provides that, for ascertaining the damage that may be occasioned to any person whose interests in any lands so taken may be affected, "the Governor shall appoint two persons, and the party interested shall appoint a third, which three persons, or any two of them, shall determine the amount of compensation to be paid to the party, according to his interest in such land; and the land so taken shall, *in fee simple*, belong to the corporation or company."

Under these enactments and powers the defendant Company appear to have taken a portion of plaintiff's land for the purposes of the Railway, and to assess the value thereof the two arbitrators were, as alleged by the defendant, legally appointed and authorised to act in that behalf, and plaintiff waived his right to appoint a person, and acted as third arbitrator in his own interest and behalf.

This is an *enabling* Act and prescribes formalities for the attainment of that which it enables the parties to accomplish; these formalities are *imperative* or *absolute*, but those which are not essential and may be disregarded without invalidating the things to be done, are merely directory. (*See Hardcastle, Con. Stat., p. 16*) The defendant Company might acquire land for their purposes without submitting the assessment of its value to arbitrators by a mutual agreement between them and the owner.

The Act *enables* the Company to acquire land for the purposes of the railroad, and *enables* parties whose land might be so taken to obtain compensation therefor, and formalities not essential to these ends might be disregarded by waiver, or the mutual assent, understanding, or agreement of all parties interested.

If, therefore, the plaintiff declined to name a third arbitrator, that right was waived by him and his position of arbitrator in his own behalf, if duly recognised and agreed to by the Government or parties interested, would render such submission valid and binding.

The objection now taken and urged by plaintiff on demurrer to the validity or legality of the award on the ground of interest of the arbitrator in the result of the award is, in this instance and under the facts disclosed and admitted on the pleadings, untenable. It is true an arbitrator should be a person standing indifferent between the parties, and "if he have any *secret* interest in the subject or matter in question he is not a proper person to be a judge between the parties"; *Russell on awards* p. 116. But in this case it was clearly and distinctly known, as stated and admitted in the pleadings, to all the parties before the appointment of the arbitrators that the plaintiff was alone interested in the land. "The objection as to interest *only* applies to the case of a *concealed* interest; *Russell on awards*, p. 116. If an arbitrator have an interest in the subject of reference well known to the parties before they sign the submission, the award is good, notwithstanding his interest; *Johnston vs. Cheap*, 5 Dow., 247; *Elliott and the South Devon R. Company*, 2 De G. & S., p. 17; *Drew vs. Drew*, H. L., March, 1885. It is also forcibly urged in support of the demurrer that the maxim: "That no man is to be a judge in his own case," is most pertinent to plaintiff's position, and in a leading case in illustration of this fundamental rule the judges observed in delivering judgment "that it is of the last importance that this maxim should be held sacred"; but in reference to the same judgment it is shown the principal or rule does not apply to avoid the award of a referee, to whom, though interested in the result, parties agreed to submit their differences; *Brooms, L. Max.*, p. 119; and *Ranger vs. G. W. R. Comp'y*, 5 H. L., Cas. 72. Under the particular circumstances set out in the pleas and stated in argument in this case, it would be manifestly a misapplication of the rule to apply it here in order to nullify an award the result of an arbitration so deliberately entered into with a thorough knowledge of the interests and position of the plaintiff as arbitrator. And it would be clearly unjust and inequitable that the plaintiff should be permitted to repudiate an act deliberately done by him with a full knowledge of his surroundings, because it has not resulted as favorably to his interests as anticipated. The recognised and well-established rule:

"That no man should take advantage of his own wrong," has been properly referred to as most applicable to the case, and is replete with references to cases having a strong analogy to the position assumed by the plaintiff. Some of these authorities go so far as to hold that a person will not be allowed as plaintiff in a court of law to rescind his own act, on the ground that it was a fraud on a third person. *Jones vs. Yales, G. B. & C., 538*; *Sparrow vs. Chisman, same, 241*.

Accepting therefore, as correct the averments in the pleas and the admissions of the facts on argument, I cannot but hold, under the authorities referred to, that the arbitrators so clothed with the necessary authority were a legally constituted tribunal, in the language and spirit of the Act, to arbitrate in the manner stated, and that the award so made as alleged is valid and binding. The subsequent providing of the amount of compensation and its offer and tender by the Government as averred, ratified and confirmed the proceedings so far as they affected other interests in question, and justified the appropriation of the land for the purposes of the defendant Company.

I am, therefore, of opinion the plea demurred to sets out a good and sufficient defence to the action, and that on the demurrer the defendant Company are entitled to judgment.

HON. MR. JUSTICE PINSENT:

Several undoubted authorities were cited on behalf of the Company to sustain the position taken by it, that the plaintiff could not now set up as an objection that he had acted as arbitrator in his own case. "It has been said," says Russel on Arbitration, "that a party cannot be judge in his own case, but, if his opponent consents to his deciding the question between them, the Court will not allow an objection afterwards, though he decide it in his own favour." Again, in *Elliott v. the South Devon Railway, 2 De Gex. & S. 17*, an award was confirmed under circumstances held to amount to waiver, although the umpire had been a shareholder in and surveyor employed by another Company which was interested in the line in question.

I regret that any relaxation of the well-established rule that no man can be a judge in his own case, should have been permitted by the Courts even in the case of an ordinary reference to arbitration; and as to the principal authority cited, (Elliott's

case), which arose under the Land Clauses Consolidation Acts. I think it is very unsatisfactory.

In this action the defendant's contention would, under ordinary circumstances, be conclusive, for here the plaintiff himself was the interested party appointed by himself with consent of the official arbitrators, and the objection is not, as in the cases cited, taken to an award made by a party adverse in interest.

The question then is, are the words of the Act of Incorporation so stringent, and are the rules of construction to be applied to them such that the award is absolutely *void*? If so, no assent of the plaintiff short of accepting the compensation would bind him to permit the Company's assumption of a right of property in his lands.

If then in this case there had been a valid award and tender, there could be no trespass by reason of the Company's entry under it. It is not for a trespass committed that the compensation is awarded, but for land into which the Company would have a legal right of entry under the Act, so soon as compensation is made.

The plea, therefore, should have justified the entry under the award and its fulfilment, and alleged that these were the trespasses charged in the declaration. If these were not so the plaintiff could now assign.

This point, however, upon being pointed out at the argument, was seen and admitted at once, but the substantial question in this case remains for determination. The words of the Act are :

"The Governor shall appoint two persons, and the party interested shall appoint a third, which three persons, or two of them, shall determine the amount of compensation, if any, to be paid to such party, according to his interest therein. And in case such party shall refuse or neglect to appoint an arbitrator within ten days after notice in writing so to do from the said two arbitrators, such two arbitrators shall name a third arbitrator, and the award of any two of them shall be final and binding."

And then follow the provisions for swearing the arbitrators before a magistrate, and empowering the arbitrators to summon the parties and witnesses, and so forth.

In my opinion the appointment of the *party interested* himself, was in direct contravention of the terms of this statute.

If this Act of Incorporation were wholly a private Act, I might feel disposed under some authorities to hold that the parties interested might have waived the necessity of implicitly following its requirements.

Here the public possesses a direct interest, not only in the general subject matter, but specially in the compensation given

for appropriated lands. The public revenues have to respond to the amount, the Government of the country has to provide the money in the first place, and has after a lapse of time the right of purchase of the whole property of the corporation. Two of the arbitrators are officials appointed by the Governor, the Company has no voice in the appointment and no choice; the third is appointed by the party interested.

I am of opinion that the section of the Act quoted by me contemplates the appointment of some person other than the party interested as the third arbitrator, and that its language in this respect amounts not only to a *directing*, but *absolute* enactment, the terms of which must be strictly observed, that the authority is special and its creation must be pursued according to the meaning and purpose of the Act.

Nothing could be more dangerous, nothing I believe more inconsistent with the intention of the Legislature, than that the value of property taken under such circumstances as those for which provision is made in the "Act respecting the Newfoundland Railway," should be assessed by the party claiming that compensation.

I believe that to uphold such a position, would not only be a violation of the language of the Act, but opposed to the policy of the law; I must, therefore, decline to apply to this case those precedents which are a departure from the general rule embodied in the maxim, "*Nemo delet esse Judex in propria causa*"; and I feel compelled to hold that there never existed a legally constituted tribunal to make the alleged award, and that it is therefore wholly void, and consequently affords no ground of defence to this action.

Mr. Emerson, for plaintiff.

Mr. Kent, Q. C., for defendant.

1885, *June*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Bail—Murder—Postponement trial—Indictment found for acquittal previous trial.

Where an indictment was found for murder against a number of prisoners, application was made to postpone trial on the grounds that the witnesses for defence would be away at date of trial, and being a considerable number, if detained, serious loss would result to them.

Held—That under the unprecedented circumstances of the case, a postponement would be granted and bail taken for prisoners in certain cases.

IN the present term a bill of indictment was found against the above defendant and sixteen others for riot and tumult, arising out of the affray at Harbor Grace on the 26th Dec., 1883, to which they pleaded not guilty. Mr. Kent, Q. C., for them moved for a postponement of the trial on the grounds that most of the witnesses for the defence, to the number of some seventy, were engaged to prosecute the fishery, chiefly at the Labrador, that others had already left for the Bank fishery, and that from the length of time that would necessarily be occupied in the trial, judging from the experience in the murder charges against most of the same defendants after two trials, which lasted one hundred and seven days, the detention of the witnesses would deprive them of the means of livelihood at the only season at which they could earn it for themselves, families and others connected with them in the business; also, that three of the defendants had not been previously charged with the offence before the indictment was presented. The Attorney General resisted the application, stating that the Crown witnesses were in the same condition and he was prepared to go on. Mr. Kent also said that we might regard the affidavits he had just read as if entitled in the murder cases, as the statements therein would equally apply to proceeding with the trial of any of them. After consideration we were all of opinion the application was reasonable under all the circumstances in the misdemeanor case, and postponed the trial to the next term on the defendants entering into recognizances. Subsequently the question of the trial of one of the three undisposed of indictments for murder, upon the motion of the Attorney General for the appointment of a day, came into argument, when Mr. Kent said he would go on. It was very evident that the same reasons which influenced us in the postponement of the riot case would equally apply to this, and we came to the conclusion, in consideration with the subject of bail, that all interests would be best subserved by a postpone-

ment, but I observed that if a trial had been determined upon in either case I was of opinion the order for postponement in the riot case should be discharged and try it first. There were seven out of the nineteen against whom bills had been found in the murder case in prison, the remainder had been out on bail, and a majority of the Court were of opinion that with the exception of four the other three should be released on recognizances. The principles which ordinarily guide the Court in bailing will be found expounded in *Baronets case*, 1 E. & B. 1, *re Bartlemy*, Ib. 8, and in *re Robinson*, 23 L. J. 268. This was not an ordinary case and there is no precedent in the books to correspond with it. There were two trials and we had the opportunity, beyond the Crown depositions which are all the Court usually has before it, of hearing the evidence on both sides, we could not be unmindful that there had been acquittals on both, neither could we forego the impression made on our minds from the evidence, we did not assume to pronounce on the guilt or otherwise of any of the parties by the course we adopted in detaining or bailing, but having regard to the grave character of the crime charged, the circumstances and the principles which ordinarily apply, the conclusion I have before announced was arrived at. I believe that the course taken will ensure the appearance of the parties, and this is the principal object the Court has in view and not that of punishment before, but it cannot overlook the magnitude of the crime charged and the probable testimony to be adduced in support.

All those cases will, therefore, stand over to the next term.

HON. MR. JUSTICE LITTLE:

Under such circumstances it is perfectly apparent the Court in directing the trial to be proceeded with at present, would inflict irreparable injury and loss on a number of innocent parties, their families, and others connected with them in the prosecution of this year's fishing voyage, and probably unduly affect the course of justice by hastily pressing on a prosecution in which are involved interests of vital importance to the public and the accused.

In therefore, directing a postponement until the next term of the Court, these interests will be conserved, and by an order being made as to bail for the appearance of the accused to come

in and then take their trial under this indictment, will be secured.

The reasons and grounds given for a postponement of the trial of these misdemeanants apply with equal force to the postponement of a trial of the same parties, with three exceptions, for the charge of Murder under either of the indictments still outstanding against them. The application for the liberation of these parties on bail was reasonable as many of them have already undergone a lengthened imprisonment, and after two prolonged trials resulting in an acquittal for murder charged to have been committed by them on this same lamentable occurrence of 1883, these circumstances coupled with the tender of approved and sufficient bail for their appearance to take their trial in the next term, afford room for the exercise of the discretion of the Court in acceding to or refusing (*see authorities*) the application to bail. We find it laid down by an eminent authority that it has never been doubted the Court may bail in case of murder. *Lord Campbell in re Bartlemy's case*; and by *Judge Coleridge*, "I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him so as to make it proper he should be tried, and because the detention is necessary to secure his appearance at the trial."

The principle on which parties are committed to prison is for the purpose of ensuring the certainty of their appearing to take their trial.—*9 v. Dwg. pc. & pa., page 553.*

Regard was also paid by the Court to the ruling of *Earl, J.*, viz. :—"The principle on which the Court acts, to be, that where the charge is of a crime of the highest magnitude, the evidence clear, and the punishment the highest known to the law, the Court should not interfere, though if any one of these ingredients were wanting it might interfere, if there were special grounds for doing so."—*1 E & B, p. 1, 1852.*

The judges, therefore, having fully considered the force of the rules so authoritatively recognised in these dicta for the exercise of that discretion confided to them in matters of bail, have, by a majority of their number, agreed on the order declared by the Chief Justice on the 4th instant.

They have had a full opportunity during the two trials referred to and frequent reference to the depositions, of weighing and analyzing the testimony against the prisoners, and in their judgment have considered it right to discriminate as to the parties who may be properly liberated under the circumstances.

HON. MR. JUSTICE PINSENT:

The issue seemed to resolve itself into this, whether such of the accused as were not permitted to be bailed, and who had been and were now in custody, were to be released on bail or not.

It was pointed out that those in custody would probably suffer no more by the postponement for four or five months than by the cause proceeding, as if acquitted of the charge of riot, the Crown would still have the other indictments hanging over them for trial; and if they were convicted of riot, the time they would have been in prison would be taken into account.

The Court left counsel to consider these positions until ten o'clock yesterday morning, and itself in the meantime gave the matter grave consideration, in view particularly of the sacrifices and sufferings to which innocent persons and their families, their employers and their servants, would be subjected by an enforced trial at this season of the year.

I arrive at the conclusion that the Court should assume some responsibility in this matter, and reconcile as far as possible the relief of witnesses and unnecessary hardship to parties accused, with security for the future trial of such of the cases as the law advisers of the Crown may hereafter decide to proceed with.

The Judges have therefore, after consultation, decided to accede to the applications for postponement conditionally, that the accused in the charge of riot, and those committed on the charges of homicide (with four exceptions, viz: Coady, John Welsh, Patrick Harper and Nicholas Bradbury, who are continued in custody), find good and sufficient bail to stand their trial in the autumn.

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1885, *June*. PINSENT, J.; LITTLE, J.

Remuneration for extra services—Action for—Implied contract—Authority of official to pledge credit of Government—Reimbursement of moneys expended.

Where a police officer was transferred to a station of greater responsibility, entailing work beyond his ordinary duties, although there was no express agreement for extra remuneration, in an action for payment for extra services.

Held—That as in the case of ordinary parties to a contract of service, if an official's position be altered and he be transferred from a place of less responsibility to one of greater, or extra or new duties be imposed on him, he is entitled to compensation.

Held—Also that where a case of absolute necessity arises for an officer, in his official capacity, to incur an unavoidable expenditure, he might seek reimbursement from the Government.

COMPLAINANT, who is a member of the Police Force, was in the year 1878 removed from Old Perlican, where he had been stationed for four years, to Trinity, there to hold the place and fulfil the duties of both constable and gaoler.

There had previously been at Trinity a resident salaried gaoler, who attended to his private business as well as to the duties of his office.

This plan has been wisely changed in several places by the appointment of police constables.

Complainant remained in office at Trinity for three years and nine months, when he found, as he states, that the expenses of living in his new position were such, and the health of his wife and family from the very ill condition of his gaol quarters was such, that he was obliged to resign and return to his ordinary place in the force.

In the meantime complainant had necessarily expended, as he alleges, for coal, firewood, light, and various small articles, the sum of over £40, and he claims, moreover, that he is entitled to receive compensation for his extra duties as gaoler at the rate of ten or eleven pounds per annum.

The particulars are annexed to the petition, together with a statement in regard to prisoners, (inclusive of lunatics), whom as gaoler he had in charge from time to time during his incumbency at Trinity. The total number appears to have been forty-six.

Part of the plaintiff's case is that ten tons of coal are allowed by the Government for the "Court House and Gaol" at Trinity, and only three were delivered to him, the remaining seven being retained by the stipendiary Magistrate on the plea that in winter he uses an office at his dwelling house.

The case for the defence is that there was no agreement express or implied to increase the plaintiff's salary or to make him any allowance as gaoler, or to supply him with fuel and light; and that plaintiff has no right to recover from the Government for articles which it did not empower him as its agent to provide; that the Government only recognises requisitions and accounts certified by the magistrate, and that all such had been paid.

I quite concur in the general proposition put by the Solicitor General that officials have no authority to pledge the credit of the Government or to incur expenses without warrant, but I am of opinion that in illustrating this position he put the case too broadly when he contended that it was no concern of the plaintiff as gaoler whether the persons committed to his custody suffered from cold or lived in dirt.

I think it was the plaintiff's concern. In the positions which he held certain duties are cast upon him by law, but they are to be discharged without cruelty or unnecessary rigour or degradation towards the persons committed to his custody.

While, therefore, the Government is perfectly right in contesting unauthorized claims, I am inclined to hold that if a case of absolute necessity arose for an officer to incur an unavoidable expense, as for instance in the commonly humane discharge of duties cast upon him in his official capacity, he might seek reimbursement from the Government.

In this case I am opinion that in the matter of coal, a most inordinate share, to say the least of it, was taken from the allowance for "Court House and Gaol" to supply the office at the Magistrate's house.

This appropriation seems to have been recognized for some years, but if the effect of taking seven tons out of ten for this purpose was to leave prisoners, lunatics, and, in one instance, a woman with a sucking child, without necessary warmth in a dilapidated building in winter weather, it would be difficult to question the implied contract of the Government to pay for fuel provided to prevent these consequences.

In this case, too, there was a positive allocation of ten tons of coal, a quantity not, however, furnished to the gaoler.

Upon the other heads of his account I regret to say that, although the items appear to be reasonable, the plaintiff has failed to make the requisitions which he should have made to the Magistrate, and, failing him, to the Government or Board of Works, and has incurred an expense which he might either have avoided or for which he should have sought authority.

As to the plaintiff's claim for salary or extra allowance as gaoler, I have no doubt that, as in the case of parties to an ordinary contract of service, if the Government alters a man's position and transfers him from a place of less responsibility to one of greater, or impose extra duties upon him he is entitled to fair compensation at its hands.

The plaintiff, far from having his position improved, as is contended, by having free quarters at Trinity, was deprived of the allowance of six pounds a year, for which he had provided comfortable lodgings at Perlican.

In the cases of the police constable and gaoler at Twillingate and other places extra allowances to the incumbent as gaoler have been and are made.

The judges, having reconciled minor differences in detail amongst themselves, the conclusion of the Court on the whole case is that the plaintiff should have judgment for the sum of £40 (\$160) with costs.

HON. MR. JUSTICE LITTLE:

The petition in this action was preferred to this Court under the provisions of title 4, chap. 29, of the Con. Stat., "providing for the recovery of claims *ex contractu* against the Government."

He made applications to the Attorney General and Inspector of Police for remuneration for his extra services as gaoler and keeper, and had received forty dollars on account thereof. No express understanding or promise was made on account of respondent to pay complainant or allow him any *specific* amount or increase of salary. The Government allowance of coal of ten tons per annum for the court house and gaol was not supplied, three tons only being received each year whilst complainant was in charge. The items set out in the bill of particulars of his claim, and purchased and paid for by him, amounted to £42 8s. 9d., were, as he stated on oath, necessary and indispensable to the use and purposes of gaol and court house. He alleged that other constables acting in same position and capacity were allowed fuel, light, &c., and were paid extra for their services. He therefore claims to be paid at the rate of forty dollars per year (the annual allowance paid them) for his services over and above his pay of £70 per year as police constable, and also the amount of £42 8s. 9d. as paid for necessaries.

The Attorney General, on behalf of the Government, by his answer, admitted the transfer of the complainant from Old Per-

lican, but denied that any promise of increase of pay, or that he was entitled to any for his services as gaoler or keeper; that he was given comfortable quarters in the court house free of charge, and was supplied with fuel and light necessary for his purposes and saved the cost of house rent; that all requisitions from the local magistrate for necessities for gaol purposes in that locality had been duly attended to and supplied by the Board of Works during the time complainant was there in charge; that an increase of salary was allowed in 1882 to all of the police force who might hold such positions, and he participated in and benefitted by that increase; that he had no authority to incur any indebtedness on account of disbursements for gaol purposes, nor was it at all necessary he should do so.

Mr. Cole, the stipendiary magistrate at Trinity, in his evidence as a witness for respondent, stated the previous gaoler and keeper was not a policeman, but followed his trade as a carpenter and was allowed \$14 per year and seven tons of coal, nothing more. Complainant had made no application to him for requisites for Court house or gaol, and only received three tons of coal per year, and \$4 latterly per quarter for cleansing and washing purposes, &c. If Smith had regularly applied by requisition many of the articles charged for by him would have been supplied, and were regarded on the whole as reasonable and necessary for the service.

Inspector Carty confirmed the statement that no arrangement had been made or agreement entered into with complainant for any extra pay on his assuming the position of gaoler and keeper. At Burin and Twillingate the policemen discharging the duties of gaolers and keepers of the Court houses do receive an allowance or remuneration in addition to their salary as policemen. In July, 1882, he remitted, by order of the Government, \$20 to complainant for his extra services, after complainant had applied for compensation as stated by him.

Mr. Knight, acting Secretary Board of Works, proved that all requisites as charged for by complainant should have been applied for by requisition to the Board, and that no such application was made.

The complainant, as a servant of the Government, would not be justified in assuming the authority attempted to be set up or availed of by him under the circumstances, by incurring an indebtedness on account of the Government for requisites or

supplies purchased for the department in his charge without orders from the proper authorities. If such a principle were recognised departmental control could not be observed, and a latitude would be given for reckless conduct and extravagance in the management of such institutions as that placed in charge of the complainant.

But as it appears from the evidence he regularly applied for an allowance of coal and light, and received a very inadequate supply, less than that allowed by the Government, and that the extra quantity was indispensably necessary for the purposes of the institution, and considered so by the local magistrate, the amount expended by him on this account may lawfully and equitably be allowed.

In regard to his claim for extra pay or remuneration for his services as gaoler and keeper, it does appear that the order of his transfer from Old Perlican to Trinity was accompanied by some assurance and implied understanding that the change in his position would result in an improvement of a substantial and remunerative character.

There is no doubt he received a certain increase of pay in pursuance of such understanding, or as a recognition of his claim for remuneration, for the discharge and performance of the alleged increased duties. The fact that others of the police force holding similar positions of trust to that held by complainant are allowed and have been paid an amount over and above their regular pay, also strengthens and confirms his contention in this behalf. There are grounds, therefore, in this particular to justify a claim under an implied contract or agreement for some compensation from respondent for the extra services alleged to have been rendered by complainant.

The claim for monies disbursed by him for the items set out in his particulars for requisites other than coal, for reasons already given, must be considered as one incurred against express authority, and contrary to regulations and orders of which complainant must have had a knowledge at the time.

Under all of the circumstances, recognising the equitable character of the claim under the Act, and on a review of the facts as set out in the evidence, it must be adjudged that complainant is entitled to compensation for his services rendered as alleged, and to be re-imbursed the monies actually expended in the purchase of coal, as charged in his bill of particulars.

His right of recovery being established the question of the amount to be awarded him became a matter of no little difficul-

ty, and the Court, after consideration of all the circumstances, is of opinion that the complainant is entitled to judgment in his favor to the amount of \$160 with costs.

A. J. W. McNeily, Q. C., for complainant.

The Solicitor General (Winter), for respondent.

UNION BANK OF NFLD. v. FRANCIS
McDOUGALL, ET AL.

1885, July. HON. MR. JUSTICE PINSENT.

Fraud—Facts constituting—Cancellation deed of composition—Bill of complaint for.

Where a banking company entered into an agreement with a customer to accept nine shillings in the pound for his indebtedness, it afterwards appeared that the agreement was made in ignorance of the customer's assets and liabilities. A bill of complaint was filed, in which the customer was charged with fraud and misrepresentation, and prayed for the cancellation of the deed and payment in full of the original indebtedness.—Demurrer on the ground amongst others, that the bill contained no particulars of fraud or misrepresentation, and was erroneous in seeking for payment in full of original indebtedness.

Held—That where fraud is charged, there must be a sufficient averment of the facts which make up the charge.

Held—Also that nothing would be done in equity more than to place the parties in the position they stood in prior to the composition.

In this case the plaintiff Company seeks the cancellation of a composition agreement entered into between the Company and the defendants, by which the former agreed to accept, and the latter to pay, nine shillings in the pound upon an indebtedness of £2,876. Five shillings, the first instalment under this agreement, have been paid to the plaintiff and the other creditors of the defendants.

The company now alleges that such payment was accepted in complete ignorance of the facts relative to the statement of assets and liabilities of the defendants, and that since then the plaintiff company "has discovered that so far from its being the truth and fact that the said statement of assets and liabilities was a full, true and just statement, and truly and correctly showing the quantities, qualities and values of the said assets, and of each item and particular thereof, as it professed to do, it did substantially and in fact misrepresent and misstate

the values of at least a considerable portion of such assets by largely understating such value. That such misrepresentations and misstatements were deliberately and falsely made with intent to deceive the plaintiff, and lead to the belief that they were of much less value than in truth and in fact they were, and to induce the manager of the plaintiff bank, and through him the other creditors, to sign the composition, &c."

The bill of complaint sets out, that upon discovering this, the manager wrote to the defendants, notifying them that "fraudulent circumstances had been discovered in the schedule," and that, pending a settlement, defendants were to make no further disposition of their property, to which the defendants replied, disclaiming "in the most emphatic manner any proceedings upon their part, or any statements which have the slightest tinge of fraud," and they declined to open negotiations for a further compromise, and they refused to deliver up the agreement for composition.

The bill of complaint concludes by praying that the defendants may be ordered to set forth and declare truly the contents of the statement, and may be compelled to deliver up the agreement to be cancelled, or to be reformed by having the signature of the manager removed, and that the parties may be restored to their original position, and that the defendants may be decreed to pay the full amount of their indebtedness to the plaintiff Company.

To this bill of complaint the defendants have demurred, and for causes of demurrer allege: (1) That the bill is vague and deficient in certainty, and does not give the defendants information of the case which they are called upon to answer, and makes a general charge of fraud without any particulars; (2) That the plaintiff Company does not offer to do equity, but seeks to set aside the composition without regard to the interests of the creditors; (3) The bill prays no enquiry into the truth or falsehood of the allegations of fraud; (4) That there is a want of parties to the bill, as the plaintiff, not suing on behalf of other creditors as well as itself, has not made the other creditors parties to the proceedings.

It will be observed that the Court has only now to deal with the sufficiency of the allegations of the bill of complaint, not with what may be the possible merits of the case, if the facts were differently set out.

The principle is well established, that where it is necessary

to allege fraud, it is not sufficient merely to charge that the contrary of certain alleged pretences by the defendants is the truth. There must be a sufficient allegation or averment of the facts which make up the counter statement, and a general allegation of fraud will not be sufficient to shut out a demurrer; the facts upon which the charge is founded must be stated, "as there is great inconvenience in joining issue upon such a general charge, without giving the defendant a hint of the fact from which it is to be inferred."

In this case some substantial facts and reasons present to the mind of the manager of the plaintiff Company, upon which the imputations of fraud, concealment and deceit are founded, should be set out in the bill of complaint.

In *Webster vs. Power*, L. R. 3 P. C. 81, it was observed that, "emphatically in a case which involves an imputation of personal fraud, and in any case in which it is sought to raise a personal equity, it is the duty of the pleader to state those facts, to shew his equity and to put the point fairly in issue."

Another important ground for demurrer is the want of parties; but upon this point the court is of opinion (the C. J. dissenting on this point) that the bill of complaint is sufficient, whatever might possibly be directed by way of amendment or notice in future stages of the case.

The case of *Hallows vs. Fernie*, which is in point, was one in which plaintiff filed a bill on behalf of himself and other shareholders to be relieved of their shares in a steamship company because of misrepresentations in the prospectus; and Lord Chelmsford, in delivering judgment, observed,—“The plaintiff’s case being founded on alleged misrepresentations, he could not properly make himself the representative of the other shareholders and file this bill on their behalf as well as his own. For the case of each person who has been deceived by a misrepresentation is peculiar to himself, and must depend upon its own circumstances.”

The same doctrine is upheld in *Jones vs. Garcia del Rio*, T. & R 297, a case in which holders of scrip filed a bill in behalf of themselves and others to have their subscriptions returned.

It was in addition to other grounds of demurrer, contended *ore tenus* at the hearing, that the prayers for relief was erroneous in seeking, besides a decree for cancelling and reforming the agreement and rehabilitating the parties, a decree for payment in full of the defendant’s original indebtedness.

This is clearly a good ground of demurrer, as whatever the merits of the case might prove to be, nothing more would be done in equity than to place the parties in the position in which they stood to each other prior to the composition.

The demurrer must be allowed, with leave to the plaintiff company, to amend, upon payment of the costs of the demurrer.

Mr. Kent, Q. C., and Mr. Greene, for plaintiffs.

Mr. McNeily, Q. C., and Mr. Winter, Q. C., for defendants.

IN RE JAMES LEWIS.

1885, *July*. HON. MR. JUSTICE LITTLE.

Prohibition—Rule nisi—Jurisdiction of Magistrate—Question of title—Public Beach—Obstruction to—Prescription—Rights against Crown—Use and occupation.

A party charged before a Magistrate for obstruction to Public Beach set up title (1) By prescription; (2) By occupation; and that the complaint involving a question of title the Magistrate's jurisdiction was ousted. The Magistrate continued to hear complaint. Defendant obtained a *rule nisi* on the Magistrate to shew cause why a writ of prohibition should not issue restraining him from adjudicating in the matter. On coming up for argument.

Held—That the Magistrate was justified in proceeding with the hearing to ascertain the rights of the crown and the defendant. That his jurisdiction is not ousted by a mere assertion of title. The Court must enquire fully into all the circumstances before it can be satisfied that title does come in question.

THESE proceedings originated in a formal complaint made by the Surveyor General before James G. Conroy, Esquire, stipendiary magistrate, and a summons thereon against James Lewis, the defendant, charging him with an infringement of the provisions of the fifth section of the 45th Vic., cap. , by placing erections and obstructions upon a public beach at Holyrood, and refusing to remove them when notified and requested to do so by the complainant.

At the hearing or trial under the summons, before Daniel W. Prowse, Esquire, stipendiary magistrate, and, as asserted, without offering or tendering any evidence on his behalf, the defendant, by his attorney, stated that the alleged trespass was committed by defendant under and by virtue of a claim of right by prescription to the freehold of the land or beach in question;

that by actual and continued use and occupation thereof by him and others, through whom he claims title, for a period of eighty years, he claimed a right and title in fee therein, as against the crown, and consequently excepted to the rights or power of the magistrate to proceed against defendant in the premises.

Notwithstanding this claim so set up, the magistrate continued the hearing of the case and the examination of a number of witnesses in support of the right of the crown.

Pending the hearing, defendant's attorney, on his own affidavit, applied to the Chief Justice and obtained a *rule nisi*, calling on the magistrate to shew cause why a writ of prohibition should not issue restraining him from adjudicating in the matter of said plaint and summons, and ordering, in the meantime, a stay of proceedings.

On this rule coming up for argument the record of the proceedings, so far had before the magistrate, and the affidavit of defendant's attorney, on which the rule was obtained, were put in and referred to by counsel.

The fifth section of the Act under which the proceedings were instituted directs,—

"That any person who, having been duly notified by the Surveyor General of his encroachment and obstruction, and having been required to remove the same, shall wilfully continue to encroach or obstruct any of the public beaches * * in this colony * * may be summoned before a stipendiary magistrate * * who shall decide in a summary way * * in the name of the Surveyor General, such encroachment or obstruction, * * and on being satisfied by proof thereof, such magistrate may adjudge the offender to pay a penalty of, &c., &c."

From the record of proceedings and admissions of counsel, it appeared no evidence of any kind had been taken by the magistrate or tendered on behalf of the defendant, and the inquiry on the part of the crown was not completed when the rule was granted directing the stay of proceedings.

Counsel for the crown, in shewing cause, now contended that the magistrate had absolute power and authority to adjudicate in this and like cases; that the terms of the section of the Act were specific, and the intention of the legislature was clearly declared in conferring this jurisdiction, and the magistrate was bound to proceed, notwithstanding any claim of title to the land that might be set up; that any such assertion of claim should, under any circumstances, have been supported by evidence and the magistrate might have heard or entertained it, and thereupon finally and conclusively determined on the rights of the crown and defendant therein.

In support of these positions counsel referred to *Wilberforce on Consn. Stats., Gwin vs. Knight*, 17 L. J., ex 168; *Reg vs. Young*, 52, L. J.; *Thomson vs. Irwin*, 142, B., &c.

Defendant's counsel contended the jurisdiction assumed by the magistrate was subject to the well recognised rule and statutable provision "that such jurisdiction is ousted in a cause or matter being tried before him when the title to land arises or is put in issue"; that the general restriction was more particularly imported into this Act in the proviso set out in the sixth section "that it should not apply to a case of disputed right of way over private property," and this clearly evidenced the intention of the legislature. He therefore contended the magistrate could not proceed, and that the *bona fides* of the plea or claim of defendant had been sufficiently shewn to enable the Court to make the rule absolute. He cited in support of his position chap 13, sec. 3, con. stat.; 9 & 10 Vic., sec. 58; 17 *Jur. ex 558*, *Timothy vs. Farmer*, 7, C. B., p. 814, 17 L. J., 357, &c., &c.

In the matter of the application no difficulty exists in the mind of the Court in arriving at a decision in accord with the authorities, and the provisions of the statute under which the magistrate has acted, and the protection of the public and private rights involved.

The principles referred to and relied on by counsel relating to and governing the position of magistrates under such circumstances, and in analogous cases, are defined, recognised, and clearly declared in many of our Acts, and particularly by cap. 13, secs 3, 8, &c., con. stat., as well as in the Imperial Act 9 & 10 Vic., cap. 95, sec. 58. Some of the cases in the authorities referred to by counsel are clear and satisfactory in the rulings on the principle in contention;—for example, in the case of *William vs. Adams*, 2 B. and S Repts, Compton, J. repeats his ruling in the case of *Reg. vs. Cudland*, that magistrates are not under the guise of a conviction to decide questions of freehold title to land; and like dicta will be found in *Reg. vs. Lewis*, 4, T. R., 2, B.; *Pull vs. Hutchins. Comp*, 424; *Thomson vs. Ingham*, 142, B., Repts.; *Lilly vs. Harvey*, 17, L. J. N. In the latter case *Wightman, J.* observed, inter alia, the judge (magistrate) must be satisfied that the title is in question, but when it is merely suggested by the defendant, the judge must inquire into the circumstances before he can be satisfied that title does come in question. Each case must depend on its own circumstances.

The provisions of the Act under which these proceedings were instituted and conducted have not been exceeded by the magis-

trate, and he was justified in proceeding with the hearing to ascertain definitely and satisfactorily the rights of the crown and claims of the public to the beach in question.

There is nothing on the record furnished the Court to show that defendant offered any evidence to the magistrate of the alleged title or claim, beyond the assertion by defendant's attorney, and the expressed intention of defendant, made by him to the bailiff who served the summons.

It is not the mere assertion of a claim of title in such cases that will suffice to oust magisterial jurisdiction; it must be shewn to the magistrate or judge that there are really good grounds for such assertion of title or claim, and that it is not made a pretence for the purpose of captiously or vexatiously impeding an adjudication in the matter or trial, or of gaining time by delay or otherwise; but that the right or claim so set up is made *bona fide* and on facts and circumstances sufficient, *prima facie* to justify a defendant in doing so. The Court, however, does not consider the statements of the facts as set out in the affidavit referred to, or the mere assertion of title by defendant as sufficient to oust the jurisdiction of the magistrate, nor to warrant the Court making this rule absolute, and directs that the case be remitted to the magistrate for further hearing and the taking in such evidence as may be offered by defendant of support of his alleged right or claim.

Mr. I. R. McNeily, for defendant.

Mr. Johnson, for the crown.

BROWNING v. PITTS, ET AL.

1885, *July*. HON. SIR F. B. T. CARTER, C. J.

Mortgage of stock-covenant substitution for and addition to. Supplying renewals of stock in ignorance of mortgage. How far mortgagor is agent of mortgagees.

Goods were supplied to a party engaged in general commerce, and went in addition to and substitution of stock previously mortgaged. Goods were sold in ignorance of the mortgage, which was registered. Mortgagor became bankrupt. In an action by the seller of the goods against the mortgagees, on the ground that the goods were furnished to the mortgagor as agent of mortgagees,

Held—That the mortgagees were not liable under the mortgage; nor was the mortgagor their agent, no such relationship having been disclosed at the time of the making of the purchases. The mortgagor was only the agent of the mortgagees for the purposes of the mortgage, and had no power to pledge their credit.

THIS action was heard with consent before the court, and was brought to recover the sum of eight hundred and eighty dollars, with interest, for the price of two hundred and twenty barrels of flour, at four dollars a barrel, sold, as alleged, by the plaintiffs (James Browning and William B Browning) to the defendants (J. & W. Pitts, A. W. Harvey, J. Outerbridge, Ayre & Marshall).

The only two witnesses produced were the plaintiffs, from whose evidence it appeared that they had occasional trade dealings with Edward Smith, who has for some years carried on a mercantile business in St. John's under the firm of Edward Smith & Co.

The transactions out of which this action arose were: that Thomas Grace, an agent or employee of Smith, who had the management of his cash shop at the corner of Water and Queen streets, referred to in the mortgage deed hereafter mentioned, on the 3rd October, 1884, purchased from the plaintiffs for Smith, as he had previously done, merchandize, being eighty barrels of flour which were taken to the shop under his management. Smith gave the plaintiffs the usual three months' negotiable note, which fell due on the 6th January last at the Commercial Bank, where it had been discounted; he, being unable to meet the amount at payment time, gave his cheque on the bank for it, post dated seven days, when he promised to pay; the plaintiffs by their cheque retired the note. On the 21st, 23rd and 29th of same month of October Grace purchased in lots one hundred and forty more barrels of flour from plaintiffs, for all which Smith gave a like note, which fell due on the 25th January last, which the plaintiffs had to retire. Smith nor any one on his account had paid anything on either of those notes. Before the seven days had elapsed, when Smith's cheque became payable, he called a meeting of his creditors, when for the first time the existence of a mortgage conveyance from him to the defendants was made known to the plaintiffs, who had no previous knowledge of the relations in business matters between Smith and the defendants. Shortly after this disclosure, acting on advice, they, through their solicitor, demanded payment of the amounts of the notes (£220) from the defendants "for goods supplied you through your agent, Mr. Edward Smith," and having thus elected to proceed against the defendants as principals did not afterwards claim on Smith.

It further appeared from the evidence that at another meeting of creditors an agent had been appointed by the defen-

dants, who took possession of the stock under the mortgage deed; and that the same person had been appointed receiver to act for the creditors. There were no proceedings instituted in insolvency, nor any arrangement by liquidation or composition.

The mortgage deed between Smith and the defendants, to which reference has been made, under the terms of which the plaintiffs' claim was executed and registered in the proper public office of registry on the 14th day of March, 1882. The consideration stated is twenty-four thousand dollars advanced and loaned to Smith by the defendants, and the security for repayment is all and singular the stock in trade of every description whatsoever, consisting principally of drapery, dry goods, provisions, &c., being in and upon the shop and premises of Smith, Nos 71 and 72 Water Street, and in and upon his shop and premises at the corner of Water and Queen Streets, and all the lumber situate in the rear of the two first mentioned premises, and also all such stock consisting &c., which shall at any time or times during the continuance of the security be brought upon either of the severally mentioned premises, either in addition to or in substitution for the stock then being on the said premises, and also all debts then due or which thereafter might be due to said Smith during the continuance of the security. There is the usual proviso for redemption and covenant for repayment, with interest at six per cent. per annum, on the 10th February, 1883, and other usual covenants in a mortgage conveyance.

The covenant upon which the plaintiffs chiefly rely, together with the general terms of the document, to sustain their action is:—

“That the party of the first part (Smith) for himself, his executors, &c, covenants with the defendants, their executors, &c, that he and they shall and will act as the agents of the said parties of the second part (the defendants), their executors, &c., in the possession and sale of the said stock in trade and lumber, or any part thereof, and for the same and the proceeds thereof shall and will, from time to time, when required, account for and make payment, and deliver proceeds thereof to the said parties of the second part, their executors, &c., and for the purposes of such agency it is hereby provided that the possession of the said stock in trade and lumber may be left in the said party of the first part, his executors, &c.” Power of public or private sale in the event of default in repayment,

with the appointment of attorneys for the purposes of such sale.

At the close of the plaintiffs' case, the Attorney General for defendants moved that judgment of non-suit should be entered, and on a subsequent day after hearing counsel on both sides, and considering their arguments and the evidence, we were all of the opinion the motion should be granted.

Mr. Kent, Q. C., contended the business was carried on by the defendants under the firm of "E Smith & Co.," that they were the principals and liable for all debts incurred subsequent to the deed, and although unknown at the time of the sales, and not the parties to whom the credit was originally given, yet when their names became disclosed the plaintiffs had a right to hold them responsible for the claim, as Smith was their agent in the purchases, they having assigned to them all the then present and after acquired property on the several premises with the debts and Smith was by the deed constituted their agent, cited *Malus against Court of Awards*, 4 L. R. P. C., *Cox vs. Hickman*, 9 C. B. N. S., 47. 17 vs. 412 *ex parte Hampden Curtis vs. Williamson*, 44 L. J. Q. B. 29. 1 *Sweet's conveyancing*, *ex p. Mills*, 8 L. R. Chy. Div. 5, 69. *Consolidated Statutes*, 443.

Attorney General, Solicitor General and Mr. McNeily, Q. C., for defendants, no express or implied contract between the parties, the interest in the business was as it had been in Smith alone; no partnership between him and the defendants; he was the only person to whom the credit was given; the mortgage conveyance is substantially the same in terms as that ordinarily used, and the extent of the agency of Smith limited and defined; *Cox vs. Hickman*, *supra Bullen vs. Sharpe*, L. R. 9 C. P.

There is no proof whatever of a partnership or joint interest between the defendants and Smith by which he might be regarded as agent for co-partners in the purchases, and there is nothing further shewn to establish the relation of principals and agent between the parties in contracting the debt, and carrying on the business of E. Smith & Co. The judgment of Lord Wensbydale in *Cox vs. Hickman* is a very clear exposition of the law on this point. So far as the court can perceive Smith was the sole proprietor and principal. Mr. Keut admitted that the grounds on which he relied to sustain this action arose from the terms of the mortgage deed, constituting

Smith agent for the defendant's mortgagees, and from nothing that occurred outside that provision.

If the relation of agent and principal had been shewn, although Smith at the time of the purchases was the only one known and trusted, it is a well established principle of law that when that relation became disclosed the plaintiffs would have had a right to elect to proceed within a reasonable time against the defendants,—*Thompson vs. Devonport*, 9 Bo C., 78. *Smethurst vs. Mitchell*, 1 E. & E. C., 22. *Curtis vs. Williamson*, 1 L. R. Q B., 57. In *Reynell vs. Lewis*, and *Wylde vs. Hopkins*, 15 M. & W., 517, decided shortly after *Parrett vs. Lombert*, 1b 489, the Court of Exchequer took occasion to lay down the principles applicable to cases falling within the class, like the present one, and which will be found to afford throughout important practical illustrations of that maxim, which, in the words of *Tindal, C. J.*, 8 *Scott, N. R.*, 830, "is of universal application," *Qui facit per alium facit per se*.

The question, "observed the court, in all cases in which the plaintiff seeks to fix the defendant with a liability upon a contract, express or implied, is, whether such contract was made by the defendant, by himself or his agent, and this is a question of fact for the decision of the jury (with the court in this case) upon the evidence before them. The plaintiff, upon whom the burthen of proof lies in all these cases, must, in order to recover against the defendant, show that he, the defendant, contracted *expressly or impliedly, expressly* by making a contract with the plaintiff, *impliedly* by giving an order to him under such circumstances as show that it was not to be gratuitously executed; and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorized, (*see Cooke vs Tonkin*, 9 Q B., 236), and that it was made as his contract." The judgment further proceeds to give illustrations of the different ways in which an agency may be constituted, and the whole case is valuable to the law student for reference. Besides the general principles recognized by the court as establishing agency in cases of contract, we have the words of the covenant in the document between the parties before us, upon which the plaintiffs have relied to fix the defendants, and which explicitly defines their relative positions, viz.: that Smith was to act as their agent in the possession and sale of the stock, &c., and to account for the same when required, and that the possession might be left with Smith. All this, it will be observed is, for

the purpose of securing repayment of the advance, so far as the stock would secure that, and is quite a different thing from constituting or recognizing Smith as an agent to pledge the credit of the defendants, mortgagees, for contracts that he might enter into with others. Clearly, Smith only was the person to whom the credit was given, and the mortgage assignment to the defendant was not kept secret, but was recorded in the public registry on the day of its execution. Whatever might be the liability of the defendants, if any, in another proceeding, we can have no hesitation in this case in confirming our judgment in favor of the defendants.

Mr. Kent, Q. C., for plaintiffs.

The Attorney General, the Solicitor General, and Mr. McNeily, Q. C., for defendants.

NOSEWORTHY v. BOWRING.

1885, *July*. HON. SIR F. B. T. CARTER, C.J.

Inflammable Oils Act—Quantity on vessels same time—Confiscation—Fine—Penal statute—Construction of

A party was convicted and fined for violation of Inflammable Oils Act, 43 Vic. cap. 17, "having on board a ship stored in harbor at same time greater quantity than five casks." Under 31 Vic., cap. 13, provision is made for confiscation of oil in addition to fine. Complaint was under 31 Vic., c. 13. Complainant contended oil should be confiscated. Both complainant and defendant asked for a case to be stated for the opinion of the Supreme Court, which was granted. On the hearing it was

Held—That it would be stretching the principle of construction in *pari materia* to include a penal provision in another Act, when the Legislature has expressly declared the penalty. An order for confiscation could not be made cumulative the fine.

THIS is a special case stated for the opinion of this court by James G. Conroy, Esquire, one of Her Majesty's justices of the peace for the Central District, authorized under the 21st and 22nd Vic, cap. 43.

The complaint made was that the defendant had kept a greater quantity than five barrels of kerosene oil at one time upon a place in the harbor of St. John's, contrary to the statute in such case made and provided.

Upon hearing the parties and the evidence, the justice adjudged that the defendant had committed a breach of the 43rd Vic., cap. 17, and fined him in the sum of two dollars. Whereupon both parties entered appeals. The justice, on notice to that effect, from the complainant, under the said 20th and 21st Vic., cap. 43, to state and sign a case setting forth the facts and the grounds of his determination for our opinion, stated that at the hearing before him on the 11th of June last, it was proved that the appellant, Noseworthy, had, on the previous 2nd of June made a complaint before a justice of the peace for the aforesaid district, that he had reasonable cause to suspect that a larger quantity of kerosene oil than five barrels was deposited on board the hulk *Huntress*, in the harbor of St. John's; that he procured a warrant to search for the same; that on searching the hulk he found three hundred barrels of kerosene oil thereon, of which three were broached, and two hundred and ninety-seven were full; that he seized two hundred and ninety-two barrels and had them removed to the public oil store, respondent providing carriage. Respondent admitted that the hulk was moored to his Southside premises, was his property, and used by him for storage of goods. Proof was given that the appellant made complaint of the seizure by him as aforesaid, and obtained the summons upon which, after hearing the evidence and counsel, the justice adjudicated.

The appellant, Bowring, respondent, aforesaid, also gave notice to the justice to state and sign a case under the statute, and the justice has stated that in addition to the facts hereinbefore recited, it was further proved that before storing the said oil in the *Huntress*, appellant, Bowring, called at the magistrate's office to know if he could legally do so; he swore, and it was not contradicted, that one of the magistrates, upon looking over the Act, said he saw no objection to Bowring doing so, but refused to authorize him to do so. It was also sworn by the clerk of the peace, who was present at the time, and he was not contradicted, that both the magistrate and himself had advised the appellant to consult his legal adviser. The oil was put on board the *Huntress* from the importing ship in open day, without concealment, and was piled on the deck of the hulk, little or none going under the hatches.

The statutes upon which this proceeding is based are the 36th Vic., cap. 13, and the 43rd Vic., cap. 17. The former Act, by the first section, prohibits the keeping of more than five barrels or tierces of kerosene or other inflammable oils within

certain distances in the towns of St. John's, Harbor Grace and Carbonear, (except in buildings approved of by the Governor in Council); and the third section, in the event of violation, prescribes the proceedings to be taken against an offender before a justice of the peace, which was followed in this case, and if, after default or a due hearing after appearance, the justice shall convict the defendant, he shall make order for the confiscation and sale, by public auction, of the oils seized, and after deducting reasonable costs, shall award out of the proceeds one half to be paid to the informer, and the other half to be applied towards defraying the expenses of the fire companies of the said towns. The 4th section subjects every person, being owner of said oils, and the person having the same in charge or keeping, and the occupant of the place where the same shall be unlawfully deposited or kept, on due conviction, of having wilfully done anything contrary to the Act, respectively, to forfeit and pay a sum not exceeding two dollars for the first, five dollars for the second, and ten dollars for the third offence, to be recovered, &c., and the forfeiture or fine appropriated as by the third section.

It would appear that the Act just referred to was not considered to apply to such oils deposited on board craft in the harbors of the places above mentioned, and the 43rd Vic., cap. 17, was passed, which by the first section prohibits a larger quantity than is limited by the aforesaid Act to be on board of any ship, vessel, &c., but not to apply to oils imported awaiting discharge or departure from or by any vessel, &c.; and by the 2nd section it is provided that any person acting in contravention of the first section shall be liable to the penalties and forfeitures prescribed by section four already referred to, of the first mentioned Act.

Mr. Emerson, for Noseworthy, contended before the justice, as he did before this court, that an order for confiscation of the oil should have been made under the third section of 31st Vic., cap. 13, cumulative with the penalty; that both Acts relating to the same subject should be construed together, and that the confiscation was inseparable from the procedure, he further ingeniously argued before us that although the confiscation was not expressly mentioned in the latter Act, the Legislature must have intended that it should follow a conviction, as other provisions to be found in the first, although not repeated in the second Act, were presumably included, such as storing oil and the rates applicable for storage, &c., thus evincing the intention

of the Legislature that both Acts should be regarded together in accordance with the recognized principle of the construction of statutes on the same subject in *pari materia*.

Mr. Johnson, for respondent, contended that the latter statute, by the 2nd section, expressly declares that the penalty or forfeiture for violation of its provisions is that prescribed by the fourth section, *supra*, and that the confiscation clause could not be imported on a conviction under the latter statute.

The justice was of opinion that the statute, being a penal one, should receive a strict construction by its expressly applying the penalties in the fourth section of the first Act, which he held by implication to exclude the confiscation of the oil, and in this conclusion we all concur.

Mr. Johnson took objection to the irregular character of the proceedings instituted before the justice, and certainly the summons ought properly to have been more specific in naming the statute under which the charge was made, and the penalty or forfeiture sued for, but the omissions could easily have been amended, and the defendant or respondent does not appear to have been in any way thereby prejudiced in his defence to induce us on that account to disturb the conviction. Mr. Johnson also contended that the previous application made to the magistrate for advice on the law, negatived the *wilful* violation of the statute, which should have been shewn to ground a conviction for the penalty under the fourth section: but we think the justice rightly decided on this against the defendant. The magistrate apparently did not, as he could not have undertaken by any opinion of his to authorize a proceeding in contravention of the clear obligations of the statute, and although the defendant may be assumed not to have *wilfully* intended to infringe the law, yet undoubtedly he *wilfully*, that is deliberately or intentionally caused the oil to be placed on board the hulk in the harbor of St. John's, which sufficiently brings the case within the statute.

It is too well established to admit of any doubt that statutes relating to the same subject are to be construed so that each of them may explain, interpret and enforce the others, and although they may have been passed at different times, although some of them may have expired or have been repealed, *Ex p. Copeland*, 2 D. G. M. & G., 914, 919, citing *R. vs. Lordale*, 1 Burr., at p 447, per Lord Mansfield, C J, yet it would be unwarrantably stretching the principle of construction in *pari materia* to include a highly penal provision in another Act, although in

reference to the same subject, where the Legislature has expressly declared what penalty or forfeiture is to be adjudged in case of infringement. The adoption of the preliminary mode of proceeding or procedure provided for in another Act on the same subjectas was done in this case, even if properly so done, would not justify the justice in making an order of confiscation not expressly or impliedly authorized by the statute alleged to have been violated.

The Acts on this very important subject require reconstruction in the interests of the public, so that cases coming within the spirit of the enactments and the mischief intended to be guarded against, should be clearly defined, with the penalties or forfeitures to attach without question or doubt.

We are all of opinion that both appeals should be dismissed and the conviction affirmed.

Mr. Emerson for complainant.

Mr. Johnson for defendant.

— — — — —
IN RE THOMAS DUNN.

1885, *July*. HON. MR. JUSTICE LITTLE.

Will—Execution of—Testator a marksman—Newfoundland Wills' Act, Consolidated Statutes, cap. 30.

Where a creditor cited the next of kin to propound the testator's will it appeared that the testator had executed his will by making his mark in the presence of two witnesses, one only of whom signed in his presence the other subsequently signed it, but not in the presence of the other witness.

Held—That the will was inoperative, and could not be admitted to probate, not having been signed in the presence of testator and of the other witness, and testator must be held to have died intestate.

In this matter the next of kin of deceased were cited by a creditor or a mortgagee to bring in and prove, in solemn form, a document alleged to be the last will and testament of deceased. This document was produced, and the examination of the witnesses in support of it duly taken by the court. From the evidence given by Byrne and Carew, the only two witnesses to the will, it appears that in the year 1869, Carew, at the instance of Dunn, and in the presence of Byrne, drew up this will, read it over to Dunn, who, in their presence, thereupon executed it,

by placing his mark thereto, and Carew signed, as a witness, and delivered it to Dunn. Byrne did not at that time sign it as a witness, but did so some time after, but not in the *presence of Carew*. The provisions of the first section, cap. 30, con. stat., "Of Wills and Testaments," directs * * "in case such will shall be made by a marksman * * it shall be signed by him, in presence of two witnesses, who shall, in the *presence of each other*, and of the testator, sign the same as witnesses * * &c." This paper writing, therefore, because of the attesting witness, Byrne, not having signed his name as such in the presence of Carew, the only other witness, is inoperative as a will, and cannot be admitted to probate.

It was urged by counsel that in the event of the proof being insufficient to establish this as a will, effect might be given to a document previously executed as such by testator, and destroyed by him at the time of the execution of the paper writing now being propounded. The only evidence furnished in support of this position is that of Mr. Byrne, who swore to the contents of the document referred to, and that it was burnt by the testator in Carew's and Byrne's presence at the time of the execution of the will now before the court, testator believing at the time that the latter revoked the previous will. This evidence is entirely unsupported by Carew, who did not remember anything of these circumstances, and was not aware of Dunn ever having made any other will than that drawn up by him (Carew) and now in court.

The court, therefore, must pronounce against the document now propounded as a will, and declare it invalid; that there is no sufficient evidence to warrant them in entertaining the alternative motion of counsel in support of the alleged first will; that deceased must be regarded as having died intestate, and that administration to his estate be granted to Prescott Emerson, Esq., Q. C., Chief Clerk and Registrar of this Court.

Mr. McNelly, Q. C., for a creditor.

Mr. Emerson, for next of kin.

KENNY v. HUTCHINGS;
McPHERSON v. QUEEN INSURANCE CO.

1885, August. CARTER, C. J.; LITTLE, J.

Policy of Insurance—Assignment of under deed of mortgage—Rights of attaching creditor—Mortgage not being registered.

Where property of mortgagor was insured and policy held by, though not formally assigned to mortgagee, property being destroyed by fire, the insurance was attached in the hands of the company by a creditor of the mortgagor. The mortgage, previous to the destruction of the property, was not registered, nor had the company notice of the assignment of the policy. On a case submitted for the opinion of the Court,

Held—That the benefit of the policy passed to the mortgagee. The attachment in no way affects his rights.

(Special case for the opinion of the Supreme Court).

On the 12th day of May, 1883, the above-named Patrick Kenny, being indebted to Campbell MacPherson in the sum of two hundred and fifty pounds and upwards, executed a mortgage upon property at Clarke's Beach, one of the buildings upon which was insured at one hundred pounds currency, and was subsequently partially destroyed by fire.

Said mortgage deed contained among other covenants a covenant to insure the buildings upon said property, to keep the same insured, and assign the policy of insurance to the said Campbell MacPherson.

A policy was taken on the 14th day of May, 1883, in the Queen Insurance Company upon the said property, in the sum of two hundred pounds, said MacPherson paying the premium and receiving from Kenny the policy as a security, which policy has been from that time and is now held in the possession of the said MacPherson.

No formal assignment was made upon the policy itself or was noted in the books of the Insurance Company.

The usual notice of the expiry of the insurance was sent by the Queen Insurance Company to said Kenny, and by him to said MacPherson, who received the policy and paid the premium on the 14th day of May last.

A portion of the said property was destroyed by fire in the month of November last, which portion was insured at one hundred pounds under said policy.

Upon the 3rd day of December last the attorney of the said MacPherson called upon the agent of the Queen Insurance Company and showed the said agent the deed of mortgage

hereinbefore referred to, and informed the said agent of the assignment of the said Kenny's interest in the said policy to said MacPherson, and thereupon claimed the amount of said insurance as the property of said MacPherson.

Up to that date said mortgage was not registered, but upon that date it was deposited for registration and registered.

On the 8th day of December, five days after the notice referred to in the seventh paragraph, a warrant of attachment was placed in the hands of the agent of the Queen Insurance Company at the suit of Philip Hutchins versus the said Patrick Kenny.

The agent of the Queen Insurance Company was examined as a garnishee, and expressed his willingness to pay the sum of one hundred pounds into court or to whomsoever might be adjudged to be the rightful owner thereof.

Said Patrick Kenny was not served with the copy of the writ in the suit of Hutchings against him, and was not aware that such proceedings had been instituted, but immediately upon his arrival in St. John's from Conception Bay caused the following note to be written to the agent of the Queen Insurance Company:—

ST. JOHN'S, DEC. 20TH, 1884.

SIMON DONOVAN, Esq., *Agent Queen Insurance Co. :*

SIR,—

A policy of insurance was taken by me covering a dwelling house and store at Clarke's Beach. This policy was taken at the request of Mr. MacPherson, to whom the place was mortgaged, and he paid premiums. I have to notify you that on the morning of the 30th of November the dwelling house was burned. I did not know whether the premium had been paid by Mr. MacPherson or whether it was insured or not, but believed there was no insurance. I have since learned that the premium was paid and the dwelling house insured for one hundred pounds in your office, but that Mr. MacPherson had not seen that the policy was assigned. A magisterial inquiry was had, but the cause of the fire was not ascertained. I am not aware of how it occurred. The dwelling house was completely destroyed.

PATRICK KENNY.

The opinion of the court is asked as to whether the said MacPherson is entitled to said insurance of one hundred pounds, or if the amount should be paid into court to the credit of the suit of Hutchins *vs.* Kenny.

Kenny was subsequently declared insolvent and Mr. A. F. Goodridge appointed trustee. The said trustee, who is aware

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of all the facts, does not make any claim upon the fund in question.

We have duly considered the facts as set out in the within special case submitted for our opinion, and on reference to authorities having any bearing on the respective rights of the parties, we are clearly of opinion that the benefits of the policy passed to the mortgagee, and that he is entitled to the four hundred dollars alleged to be available in the hands of the Queen Insurance Company under the policy. The attachment in no way affects the rights of the mortgagee.

D. J. Greene, for attaching creditor.

J. R. McNeily, for C. MacPherson.

STONE *v.* WELLAND, ET AL.

1885, *October*. HON. MR. JUSTICE PINSENT, D.C.L.

Trespass—Interference with fishery—Force of local usage in the setting of cod traps—Fishing ground—Splitting ground—Forcible removal of nets and craft.

A fishing vessel, with master and crew, anchored and fishing with nets set along the coast, was boarded by the residents near by, their nets taken up and placed on board their craft, their anchor weighed; they were informed they would not be allowed to fish, alleging as a reason that the mode of fishing was a violation of the law laid down by the people of the neighbourhood for the government of the fishery. The master made sail and went and fished beyond the limits. In an action for damages.

Held—That it is not competent for the inhabitants of any particular locality, or for persons engaged in any particular mode of fishery to impose upon others what is not the law of the land. Fishermen may agree to regulations and give them effect by voluntary submission, but they do not bind those who are not a party to them. All the Queen's subjects have equal rights on the fishing grounds, and in their uses everywhere on the coast, and there is no restriction upon them, except the existing law and the rights of those actually occupying portions of the fishing grounds.

In this case, tried at Greenspond, the defendants, residents of Ladle Cove, near Fogo, are sued for damages for their forcible interference with the plaintiff's fishery.

It appears that on the 9th of July last the plaintiff and his crew were fishing along the coast in their craft, a vessel of about twenty tons measurement.

In the course of their voyage they set twelve cod-nets about a mile above Ladle Cove Island, off Apsey Cove Point.

The defendants and others, to a considerable number, came off from the neighbourhood in three boats and requested the plaintiff to take up his nets, which he refused to do.

The nets had been set about half a mile from the shore. The defendants insisted upon the plaintiff removing his nets, and informed him that by so fishing he was violating the rules which had been laid down by the people of the neighbourhood for the government of the fishery. The plaintiff replied that he would take the consequences, and that if his nets were interfered with he would seek the protection of the law.

The three boats then proceeded to the plaintiff's buoys, took up ten of his nets and brought them alongside his vessel, occupants of two of the boats putting the nets on the deck of plaintiff's vessel, those in the third boat leaving others of the nets in a bundle in the water at the ship's bows.

Then the crew of the largest of the three boats went on board to heave up the plaintiff's anchor and to tow his vessel off, upon the ground that the plaintiff was splitting his fish and throwing the offal overboard upon a fishing ledge.

This crew hauled up the anchor and fastened it to the bobstay of plaintiff's vessel.

The plaintiff then set sail and went away beyond the limits prescribed by defendants, as included in the rules against the setting of cod-traps, a distance of about eight miles.

The plaintiff's nets are said to have been slightly damaged by the defendants in their removal. The plaintiff states that he would probably have remained on the ground eight or ten days, and that his catch during the two days he was upon the disputed locality was six to ten quintals per day, and he claims \$400 damages.

The plaintiff's contention is: that where he was splitting fish in his vessel was not a fishing ground but a splitting ground. The defendants, on the other hand, say that this was one of their usual and best fishing grounds; and, as to the removal of the cod-nets, they justify under their local rules and usages, which for many years have precluded amongst themselves the use of cod-nets.

Upon the question of throwing overboard the fish offal aris-

ing from splitting, I observed in the course of the trial, as I repeat now, that while, if the place used for the purpose was a fishing ground or fishing ledge, it is contrary to law to cast overboard the offal there, and that parties violating its provisions are subject to penalties (46th Vic., cap. 8, sec. 2), yet there is no authority in law given to persons to interfere with others for its enforcement, except by way of complaint to the proper authorities.

The defendants were, therefore, guilty of an unwarrantable and high-handed trespass in boarding and attempting to remove the plaintiff's vessel, and, in effect, forcing him from his anchorage.

With regard to the taking up of the cod-nets, which does not appear to have been attended with any serious damage to the property itself, or to have been intended so to be, the plea which sets up a local rule and custom must be over-ruled.

It is not competent to the inhabitants of any particular locality, or for persons engaged in any particular mode of fishery, to impose upon others regulations not borne out by the law of the land.

All the Queen's subjects have equal rights in the fishing grounds and in their uses, everywhere on the coast, and there is no restriction upon them, except in the respect that must be shown for the already existing rights of persons actually occupying and making use of positions on the grounds, and in the respect which must be paid to the limitations which the law imposes in matters of time and place and manner of conducting the fisheries.

With reference to these cod-nets, they do not appear to have been set in an illegal manner, and they should not have been disturbed.

Both as to their use and as to the injuriousness or otherwise of the practice of throwing fresh fish refuse overboard, the opinions of witnesses in this case were directly opposed, but whatever may be the merits of these controversies those who desire a change must seek it through the regular legislative channels.

As in the case of the fishermen of Barra, the inhabitants of a particular locality may arrange amongst themselves and give effect by voluntary submission to the rules they make so far as they themselves are concerned, but they cannot bind persons who are no parties to their agreement.

The question, therefore, for me resolves itself into one of damages.

The plaintiff did not seem desirous of exacting vindictive damages, and his object appears to be more to have his rights settled and secured to him for the future than to be compensated for past loss.

There was great difference of opinion between the parties as to the profitable use of the cod-nets for some days after their removal. The plaintiff expected to have secured nearly as much every day for a week as he did during his two days' stay off Ladle Cove. The defendants, on the other hand, concluded from their hook-and-line experience of the grounds that the fish were scarce.

This is a very speculative matter and it is difficult to form a standard by which to estimate it.

The plaintiff went to other grounds and was comparatively unsuccessful. There is no doubt that he suffered a loss, and there is no question that the trespasses, both to his cod-nets and his ship, were such that people must be taught they cannot commit them with impunity.

Let judgment be entered for the plaintiff for eighty dollars.

Mr. A. O. Hayward, Q. C., for plaintiff.

Mr. Hugh H. Carter and Mr. LeMessurier, for defendants.

STONE v. ASHFORD, ET AL.

1885, *October*. HON. MR JUSTICE PINSENT, D.C.L.

Road Commissioners—Drain—Damages—Misfeasance—Nonfeasance.

A Road Board, appointed under Act of Parliament, constructed but left unfinished a public drain, which caused water to flow into and on a neighbouring proprietor, and, in the winter season to render access to his premises difficult. In an action for damages it was set up as a defence that the drain had been begun when the plaintiff was chairman of the board; that on a new board being appointed they declined to finish the drain.

Held—That the Board was a continuous body, irrespective of changes, and as such were liable.

THE plaintiff in this action seeks to recover from the defendants (constituting the Road Board at Catalina) damages, laid at \$200, for so constructing and leaving unfinished a public

drain that the water was projected upon his land and against and into his store, and that it there caused damage to goods, and that the water when it froze obstructed the access of himself and his customers, and that it created personal hurt and inconvenience by flooding the floor at times to the depth of some inches.

The defendants set up that this drain was commenced at a time when the plaintiff was chairman of the Road Board; and that when the new board was appointed they only declined to go on with the work, considering that they ought not to spend any money upon it.

Previously to the making of this new covered drain, across the street and for some feet upon plaintiff's land, the water used to overflow the then drain, spread over the road, and force itself back upon the land of Mr. Miffen, on the side of the road opposite the plaintiff's premises, and to remedy this state of affairs the new drain was commenced and partly made.

The present board, in reply to the plaintiff's applications for redress, while declining to do what he requested, viz.: to complete the drain and carry it under his store at an expense of three pounds, were willing and offered to spend half that sum in opening up an old drain under a small bridge which had been filled up and disused for about twenty years and previously to the plaintiff becoming possessed of the property injured.

This course the board, as at present constituted, claims to have taken on principle, and I am glad to be enabled to relieve it of any further scruples on this point by holding that this case must be considered by relation to the state of things existing at the time the new drain was made, and not to the physical condition of the road and its neighbourhood twenty years ago.

At the desire of all parties I viewed the locality at Catalina on my way from Bonavista to Trinity, and I am perfectly satisfied that the plaintiff has suffered an injury from which he should have been saved by the defendants complying with his reasonable request.

I cannot distinguish between the road board as constituted when plaintiff was chairman and the board as now existing under the defendant as chairman. I have to regard the board in its official capacity and as a continuous body, irrespective of its political changes.

Upon the question of damage I am not disposed to allow the

plaintiff much more than the three pounds admitted to be sufficient to complete the drain. He might have constructed it himself when, after a reasonable time, he found the board would not do so, and he might then have sued without prejudice to his right to recover the necessary outlay. Indeed, it appeared at the trial that up to the last moment the plaintiff would have compromised the case for three pounds and undertaken the completion of the drain himself.

I think the justice of the case will be met by allowing the plaintiff sixteen dollars and his costs of suit.

Mr. A. O. Hayward, Q. C., for plaintiff.

Mr. Emerson, for defendants.

QUEEN v. KENNEDY ; QUEEN v. BUTLER.

1885, December. PINSENT, J. ; CARTER, C. J.

Indictment—Essentials of—In perjury—Judicial proceedings—Amendment—Arrest of judgment.

The prisoners were tried and found guilty on indictments for perjury in attempting to sustain by oath a document which was not the testator's will. In neither indictment was the pendency or contemplated institution of judicial proceedings set out. On coming up for sentence, counsel moved in arrest of judgment that it did not appear on the indictments that the oath was taken in a pending or contemplated judicial proceeding.

Held—That to constitute perjury the false evidence must be given in the course of a judicial proceeding, and must not alone be proven at trial, but must appear on the face of the indictment.

THE defendants in these cases were tried before me in this court at Harbor Grace, on separate indictments upon charges of wilful and corrupt perjury, in endeavouring to sustain by oath, as the will of John Kennedy, deceased, a paper-writing which was not his will.

After an ingenious and ably-conducted defence the juries in both cases found the accused *guilty* upon the most abundant evidence.

At the trial the attorney general, who prosecuted, moved for amendment of the indictments by adding the words :

“ Which said affidavit was entitled in the Supreme Court of Newfoundland, and was made and sworn by him (the accused) for the purpose of and

in relation to an application in the said Supreme Court then pending, for probate of the alleged will of one John Kenneley, deceased."

I gave the attorney general leave to amend, reserving to the defendants the right of exception, but he, on consideration, elected not to amend, but to leave the indictments as they stood.

Upon the defendants coming up for sentence after verdict, their counsel moved in arrest of judgment, upon the ground that it did not appear by the indictments that the alleged false swearing had taken place in a judicial proceeding.

To this two other objections have since been added, viz.: (1), that neither the substance nor the particulars of the alleged will (upon the affidavit attesting which the perjury is charged) are set out in the indictments; (2), that the indictments do not allege that the matters upon which perjury is assigned were material in any judicial proceeding.

The court attaches no importance to these last points, because, first, the perjury is assigned in Kennedy's case upon the false contents of his petition and affidavit; and in Butler's case upon the contents of his affidavit, and what the terms of the alleged will were is an immaterial consideration; second, if the pendency of a judicial proceeding is sufficiently shewn in the indictments, the materiality of the matters deposed to and upon which perjury is charged is manifest upon the face of the affidavits, which set out facts essential to an application for probate.

I therefore return to the first point raised, viz.: the absence of any sufficient allegation of a pending or contemplated judicial proceeding.

The main essential in the crime of legal perjury is that the false evidence shall have been given, or the false deposition made, either in the course of a judicial proceeding, or, for example, in the case of an affidavit to hold to bail, as the ground work of one, and this must not only be proven on the trial of the person charged with perjury, but it must appear on the face of the indictment charging the perjury.

The question for us is, do these indictments contain this essential ingredient? If the assignments of perjury are not connected in the indictment itself, with a judicial proceeding, the prosecution must fail.

It is usual in framing indictments for perjury, or others of a like character, to set out in the introductory part, amongst other things, the circumstances which show that the oath was

taken in a judicial proceeding, and that it was material to the pending litigation, or other legal cause, although, where the materiality appears sufficiently from the oath itself, it is unnecessary to aver it.

The introductory part of neither of the indictments in this case sets out the pendency, or even the contemplated institution of judicial proceedings.

Instead of this the indictment here set out that the accused wickedly and maliciously contriving and intending unlawfully and fraudulently to procure certain monies to be paid, to which the next of kin of deceased were entitled, appeared in their proper person before a commissioner of affidavits of the Supreme Court ; and in Kennedy's case the indictment proceeds to charge that the accused made an affidavit and therein falsely and corruptly, &c, " did depose and swear in substance and to the effect following, that is to say, that the several matters and things set forth and contained in a certain petition of him, the said John Kennedy, to the Supreme Court of Newfoundland, or one of the judges thereof, annexed to the said affidavit, praying that probate of a certain alleged will of one John Kennedy, deceased, might be granted to him, the said John Kennedy, as executor of the said alleged will, were correct and true ; which said petition of said John Kennedy alleged and set forth," and then follows the matter upon which the perjury is charged.

In Butler's case the false oath is averred to be " in substance and effect following, that is to say, that on the 2nd day of June, A. D. 1883, he, the said Edward Butler, was present and did see the said John Kennedy, deceased, duly sign, by making his mark, publish and declare a certain paper-writing, which said paper-writing was annexed to the said affidavit of him the said Edward Butler, as and for the last will and testament of him the said John Kennedy, in the presence of him the said Edward Butler and others, the subscribing witnesses thereto," and that he and they signed their names as witnesses in the presence of the testator, and he in their presence, and that the will had been read over to the testator, whereas in truth and fact none of these allegations were true.

The introductory inducements in these indictments would be very appropriate upon charges of obtaining money under false pretences, or for conspiracy to defraud, but whatever the indirect object might have been, with which we have little or nothing to do, the direct motive of the perjury was to obtain the probate of a forged will, the averment of which purpose is, in

the indictment against Butler wholly wanting, and his false oath is connected with nothing but an intention to commit a fraud.

In the indictment against Kennedy, while the introductory part is the same as in that against Butler, it may be gathered inferentially from the statement of the contents of his petition and affidavit that the false oath was taken in proceedings for probate in the Supreme Court.

It is to be observed that it is only in setting out in the body of the indictment the substance and effect of Kennedy's petition and affidavit that the inference of a judicial proceeding arises, there is no independent and introductory averment of the existence of such a proceeding.

Therefore, in not differing from my brother judges in sustaining the indictment against Kennedy as it stands, I am not free from grave doubt.

We all concur that without a question the indictment against Butler fails in its most essential ingredient, the allegation that the oath was had in a judicial proceeding.

In Kennedy's case the verdict is sustained, and the accused is remanded for sentence.

In Butler's case the judgment is arrested, and the accused is discharged.

HON. SIR F. B. T. CARTER, C. J. :

THE defendant was indicted for perjury in the last term of the Supreme Court on Circuit at Harbor Grace, before Mr. Justice Pinsent, and was found guilty by the jury.

Mr. Emerson for the defendant obtained a *rule nisi* in arrest of judgment to shew cause before this court upon the following grounds: (1). Not averred in the indictment that the oath was taken in a judicial proceeding in a court having jurisdiction to hear and determine such proceeding; (2). Not averred that the matters charged to have been wilfully sworn were material facts in any issue or judicial proceeding in any court having jurisdiction to hear the same; (3). The indictment does not give the substance of the matters deposed to by or in the document referred to, as a will in the indictment.

The Attorney General shewed cause in this term. Mr. Emerson and Mr. A. J. W. McNeily, Q. C., were heard in reply.

The preamble or introductory part of the indictment sets out that the defendant contriving, &c, fraudulently to have

paid to him certain monies belonging to the estate of one John Kennedy, deceased, to which monies certain next of kin were entitled, came before Israel L. McNeil, Esq. a commissioner duly appointed to administer oaths in all judicial proceedings in this the Supreme Court; and that he, the defendant, produced a certain affidavit in writing before the said commissioner and was sworn and took his oath concerning the truth thereof, and wilfully, &c., did depose and swear in substance and effect that the several matters and things contained in a certain petition of him, the said defendant, to this court, or one of the judges thereof, annexed to the said affidavit, praying that probate of a certain alleged will of one John Kennedy, deceased, might be granted to him, the said defendant, as executor of the said will were correct and true, which said petition of the said defendant alleged and set forth, among other things, that the said John Kennedy, deceased, on the day of June, A. D. 1883; that his wife had died before him, the said John Kennedy; that the said John Kennedy, deceased, had during his life time made and executed a last will and testament; that a certain paper writing annexed to the said petition was the said last will and testament of him, the said John Kennedy, deceased; and that he, the said John Kennedy (defendant) was in and by the said will appointed executor thereof, as in and by the said petition and affidavit of the said John Kennedy (defendant), filed in this court, more fully and at large appears, the truth of all which matters was specifically negated, with the usual conclusion.

To constitute the offence of perjury it is necessary that the false oath be taken wilfully, that is with some degree of deliberation, and not merely owing to surprise or inadvertency or a mistake of a true state of a question, and that it be taken in a judicial proceeding or in some other public proceeding of the like nature wherein the sovereign's honor or interest are concerned, and it is not material whether the oath be taken in the face of the court or out if it be before authorized persons, or whether it be taken in relation to the merits of a cause or in a collateral matter; *Bacons, Abridgt., vol. 6, 152*. So far as I can gather, there certainly was deliberation and no apparent inadvertency in making the affidavit in this matter. The offence is complete by taking the false oath, and does not depend on the subsequent use of it, a defendant being equally guilty although no use had afterwards been made of it, presuming it to be connected with a judicial or legal proceeding set out in

appears, all these statements on oath were specifically negatived and perjury assigned on them.

The matters contained in this affidavit, so alleged to have been falsely made, are not shown on the indictment to have been connected with any judicial or legal proceeding; for all that appears it was a mere voluntary act of the defendant, and not in the course of any legal proceeding before a court of competent jurisdiction, for any alleged purpose. The filing or exhibiting of an affidavit is not necessary to constitute the offence, nor would the filing as a record be regarded as supplying the want of so material an averment as a judicial or legal proceeding with which to connect the perjury assigned. The question of the effect of filing or the omission to do so was considered in *R. v. Crossely, Supra and Lawrence, J.*, then, with reference to this point, says, "But the principle is that whatever is material to the essence of the crime cannot be supplied by intendment. Then is not the use made of the affidavit, if at all, to be supplied by intendment? A reference is made to the files of the court to see what was done, and from thence it is to be intended that the party used the affidavit; but that it is contrary to the present rule that no material thing is to be intended, from which it follows that this kind of reference does not supply what the defendant's counsel say is necessary to be averred, because that would be supplying it by intendment." I cannot, therefore, admit the contention that because the affidavit is alleged to have been filed in the Supreme Court, it must be taken to have been made in a judicial proceeding, such as is required to ground the charge of perjury.

I have looked into the cases cited at the bar by both sides and many others, and I have come to the conclusion, but not at first without some doubt, that this objection is fatal, and that the rule should be made absolute in arrest of judgment.

The Attorney General for the prosecution.

Mr. Emerson for defendant.

1885, *December*. HON. MR. JUSTICE PINSENT, D.C.L.

Receiver of voyage—Fishery servants—Wages—Privileged creditors—Insolvency of employer—Notice of hiring.

It appeared that the plaintiff and others were shipped under an agreement with planters for the fishery, and in some cases on the premises of and with the knowledge of the supplying merchant. In some instances their names also appeared in the latter's books of accounts. The amount of fish "put in" at end of season was insufficient to pay the planter's account with his merchant. The fishery servants, notwithstanding the insolvency of the planter, claim that the merchant, the "receiver of the voyage," was liable for their wages in full. It was contended by the supplier that he was not liable in that he was not aware or "privy to the hiring," and had not had notice of the claim for wages before he had paid for the fish turned in, except to a small extent. On appeal from the decision of the magistrate against the receiver of voyage it was

Held—Engagement by planter of fishery servants on merchant's premises is evidence of privity and knowledge by merchant. When hiring takes place elsewhere, to constitute a notice it must be brought in some way to knowledge of supplier. On failure of planter, receiver of voyage is liable *pro rata* to extent of voyage received of shares and wages of fishermen, to whose hiring he was originally privy—and of such whose employment he had notice—and to the extent of voyage concurrent with such notice.

THIS is one of several cases from the Central District Court, brought up on appeal and *certiorari*.

It appears that a Mr. Ellis, a planter and dealer of the defendants (Baine, Johnston & Co.), having incurred liabilities with that firm for supplies for the past season unsuccessfully prosecuted the fisheries at Labrador, and "put in a voyage" insufficient to pay his account with the merchant and to liquidate the wages of his servants in the fishery

It was contemplated in the spring of the year that the result of the summer's business would have exceeded two thousand quintals.

The result was about twelve hundred quintals, of which it is admitted that about one hundred and ninety quintals were delivered at a period at which the defendants were affected with notice of the servants' claims for the balance of their wages.

This proportion of the produce of the voyage would represent, it is said, about 12s 6d. in the pound of the servants' claims.

Their contention is that they are entitled to be paid in full; that the defendants, as supplying merchants of Ellis and receivers of the voyage, are liable to them for the full amount, as the fish "put in" to the merchant during the season was

much more than sufficient to meet all their claims, and that their hirer and employer (Ellis) is insolvent.

They rely upon those provisions of the law which, when it shall be made to appear that the hirer or employer is insolvent, give to persons in their position a right to preferential payment (in the nature of a lien) of their wages or shares out of the produce or value of the fish and oil, "if the same be in the possession of the hirer or employer, or of any other person aware of or privy to the hiring or employing, or having notice of the claim, whether the same is accruing or due at or before the time of such other person receiving such fish or oil, or the produce or value thereof, or before paying the hirer or employer for the same"; and it is declared that they "shall be considered privileged creditors, and shall first be paid one hundred cents in the dollar, so far as such fish or oil or the produce or value thereof shall go."

The servants in these cases are principally sharemen.

Some of them were employed in St. John's and entered into their agreements or "shipping papers" with Ellis on the premises of the defendants in St. John's, in an office of theirs on their wharf, the use of which was lent to Ellis for this purpose, and there, upon the printed forms supplied by the defendants, Ellis and these servants executed their agreements.

It appears, too, that the names of several of these persons appear in the summer's accounts of the defendants with Ellis, upon whose orders they upon his account received certain goods.

Others of Ellis's servants were engaged at Brigus without at the time any privity or knowledge of the fact on the part of the defendants beyond this, that, as the plaintiffs contend, the merchant must have known that their services were required for carrying on the fishery, and that it had been the custom of Ellis, known to defendants, to engage some of his crew there; but it also appears that there were five or six more servants engaged by Ellis this year than last year.

The plaintiff in the caption to this judgment was one of those hired in Brigus, and he was engaged by Ellis in the capacity of master of cod-seine, and as such delivered to two ship masters, who collected fish for defendants at Labrador, a large quantity of fish, in the receipts for which his name appears, and which fish was delivered to the establishment and agent of the defendants at Battle Harbor, Labrador.

The questions raised in these cases are very important, and

their determination might well be associated with the history of that peculiar right which, commonly called a lien, is a statutory privilege only, which after many fluctuations in its application, sometimes on the ground of usage and at others by virtue of Imperial and other legislation, is now secured by the 24th sec., cap. 90, of the Consolidated Statutes, sufficiently cited above.

Promptitude of decision, however, will be better served by at once giving a legal and authoritative construction to the words of the Statute, which at this time confers the privilege that servants in the fishery very justly possess of having secured to them the reward of their labor out of its produce when other sources fail.

What we now require to ask ourselves is whether the defendants were, as matter of law, "aware of or privy to the hiring or employing," or whether they had "notice of the claim before paying the hirer or employer" for the produce of the voyage received by them.

They admit that they had such notice to the extent of the one hundred and ninety quintals. They deny any liability to respond the claims of the servants for the produce of the voyage returned to them prior to the delivery of that quantity.

They say that the last-named portion was "put in" before they had notice, and had been credited to Ellis's account, and had therefore been paid for.

They say, moreover, that the facts set out in the first part of this judgment are not sufficient to establish the position that they "were aware of or privy to the hiring or employing" of any of these persons.

If the language of the Act has any meaning it is plain that the provisions of the Statute conferring the fisherman's preferential claim cannot be satisfied by the mere fact of the simple knowledge of the merchant (common to all persons) that a planter cannot prosecute the fisheries without a sufficient crew.

This peculiar right preserved to the laborer in the fisheries is a statutory privilege, a deviation from what would otherwise be the ordinary legal rights and remedies of contracting parties, and it is hedged around with very just and moderate conditions and qualifications, of the benefit of which we should be as careful not to deprive the supplier as we should be solicitous to support the fisherman in his assured and ancient privileges.

If the law intended that, whether the receiver of the voyage

had paid for it or not, and that whether he had or had not any notice of the hiring, he was to be responsible for the shares and wages upon the failure and inability of the hirer to pay, it would have conferred that right in express and absolute terms.

It is clear to my mind that while the law guards the interests of the servant it was not forgetful that there was something due to the protection of the supplier from indiscriminate hiring or pretended hiring of servants in the fishery, and from the risk of unexpected claims after the produce had been more than paid for.

The question is, what facts are sufficient to satisfy the terms of the Statutes.

I am of opinion, regarding the trade relations of the colony, that such a fact as that of the fisherman being engaged on the premises and in an office of the supplying merchant, is sufficient to satisfy the Statute, and that a servant in the fishery is then justified in assuming that the privity existing between merchant and planter is carried to the extent of a knowledge of his engagement with the latter.

When the hiring takes place elsewhere, then, in my opinion, the knowledge of the hiring must sooner or later be brought home to the supplier or receiver in some such definite way as to amount to notice.

It may be by orders on the supplier for goods or money, shewing on the face of them, or by circumstances connected with them, that the orders are in favor of an employee in the fishery.

It may be by the men's having accounts for the season in the books of the merchant.

It may be by the actual receipt of part of the voyage from the men by the receiver or his agents.

It may be by communications from the hirer, or by notice or claim from the men themselves at any period of the voyage.

The voyage, affected at these stages, would, where there was original privity to the hiring on the part of the supplier, be the entire produce finding its way into the hands of the merchant during the season.

At later periods of the season so much as was being received at the time of knowledge or notice, or as might afterwards find its way into the supplier's hands, from the planter or his crew.

A supplier must be held to have paid for the produce of the fishery, when, after its being received, the planter still remains

in debt upon the season's transactions; but the receiver will, upon the failure of the hirer, be still liable *pro rata* to payment, to the extent of the voyage received, of the shares and wages of such fishermen as to whose hiring he was originally privy, and of such of whose employment notice has been given during the season, but only to the extent of the voyage concurrently with such notice and subsequently received.

I hold, therefore, that the claims of Ellis's men must be settled upon these principles, and I trust they are here laid down with such sufficient clearness, and that the facts connected with the several men's hiring and service are so free from substantial dispute that there may be no necessity for further litigation between the parties concerned.

With regard to the particular case of John Antle, which is now before us on appeal, I am of opinion that, although the defendants were not privy to his original engagement, that they were affected with notice of his employment, as the agents collecting and receiving the produce of the voyage for the defendants' firm at Labrador actually received a great part of the voyage from him and in his name and in his capacity as a shareman in the employment of Ellis.

The appeal in this particular case will, therefore, be dismissed with costs.

This litigation calls for observation upon the necessity and expediency, for the reciprocal protection of the several departments of the trade, of the fishermen being either actually engaged in the supplying merchant's office at the commencement of the season, or for the planter or fishermen themselves to give at the outset of the voyage notice to the supplier of the number, capacities, rate of remuneration, and even the names of the servants, whether on shares or wages, engaged for the season's work.

Mr. Scott and Mr. Parsons for plaintiffs.

Mr. McNeily, Q. C., for defendants.

The chief justice observed that, having been engaged in a trial, he did not hear the arguments in this matter, but on reference to the evidence, he was of opinion that the judgment of the district court, in Antle's case, should be affirmed, and so far he agreed with the conclusions generally in the judgment of Mr. Justice Pinsent; but, if any of the other parties except and desire it, he was willing to hear counsel for them before giving his judgment. Mr. Justice Little also agreed with the judgment.

1886, *January*. HON. MR. JUSTICE PINSENT, D C.L.*Contract—Whaling and freighting agreement—Construction of—Detention—Period of service—Wages—Damages.*

The crew of a vessel, under a whaling and freighting agreement, proceeded to Davis Straits. There they were frozen in. The following year they fished, and returned to Newfoundland in August, 1885. On arrival members of the crew sued for full wages and damages for Breach of agreement in not terminating agreement within the year they signed. No period was mentioned in agreement as to termination of whaling portion, though it was admitted there was a limit as to the freighting agreement.

Held—(Parol evidence having been admitted to supply the ambiguity) that it is a question for the jury to say the length of the whaling voyage contemplated, when the agreement is silent on that point. Parol evidence may be admitted to show the length of a whaling voyage contemplated by the parties to it when the agreement is silent as to the determining of the same.

THESE are actions brought for the recovery of wages and damages under an agreement for the prosecution of a freighting and whaling voyage to Davis Straits, from the port of New London, United States.

The agreement was entered into in the month of June, A. D. 1884.

The defendant's ship *New Era*, in which the plaintiff contracted to prosecute the voyage, left New London on June the 10th, and after a very slow passage to the north, called at Arkolea in the latter part of August, having previously run into a bay in Hudson's Straits, where she remained some days trading with the natives.

The ship remained at Arkolea about a week and then proceeded to New Gummiute about the first September, and not to Cumberland Inlet, the more northerly port, and which by the terms of the agreement the ship should have first visited, taking Gummiute on her return voyage.

The winds were fair for Cumberland Inlet during the first part of their stay at Gummiute. They then changed, and about the 9th or 10th day became fair, when the ship sailed for Cumberland Inlet, but meeting with head winds put back after a day or two to Arkolea Bay.

This was about the end of September. The ship there took in water for the purpose, as the plaintiff understood, of the homeward voyage.

The ship having again set out on her voyage, put into New Gummiute, and then as well as during the previous stay there, part of the crew was sent whaling, but without success.

Then, in the last week of October, the ship was frozen in at Gummiute, and so remained and did not get clear until about the first of the following August.

The crews had been sent away whaling after the last arrival at New Gummiute, and, after their return without success, and about the 19th October, the captain ordered the crew to heave up the anchor for the homeward voyage, and it was "hove up short" when the crew was ordered to knock off; and the captain, after consultation with the officers, informed the crew that he had determined to winter there, so as not to go home without a whale, as he would get no more employment from the defendant's company if he did.

In the following May the crews commenced a whaling expedition by boats to Frobisher's Bay, hauling their boats over land and ice, and they returned unsuccessful on the first of July.

In August the ship got under way for home, and on the voyage obtained some provisions from a Gloucester schooner, and arrived off the port of St. John's, Newfoundland, on the 27th or 28th of August, and so remained for two days, during which time the captain went ashore and telegraphed to his owners, and returning to the ship enquired of the crew if they would sign articles for another voyage north.

The plaintiffs declined, protesting that they had already been detained nine months over their time.

The ship then came into St. John's. The defendant (Spicer) shortly arrived there from the United States. During the ship's stay in St. John's a committee of the crew went ashore to protest to the consul, and afterwards some of them went ashore for legal advice, and were arrested and put on board the ship.

The plaintiffs, however, succeeded in getting on shore again, (the plaintiff, Gallagher, by swimming from the ship), and they took legal process for the recovery of their claims in these actions, in which bail was given by the defendant.

The ship was then fitted out and provisioned in St. John's for another whaling voyage north, although she was cleared out of the Custom House here for New London, and although it was sworn in an affidavit on the part of the defendant, made at the inception of these proceedings, that she was bound for New London.

As a matter of fact she proceeded north again and prosecuted a whaling voyage.

The right of the plaintiffs to claim in these actions turns upon the construction to be given to their agreement, or rather to that part of the contract which is peculiar to this voyage, for otherwise it contains the ordinary stipulations with regard to discipline and so forth of an agreement for a whaling voyage.

The special clause is this:—

“It is further understood and agreed that we are to receive monthly wages as set opposite our names, in lieu of our lays in freight earnings, *from the time the said schooner leaves the port of New London until all freights are discharged and all freight is taken on board at stations Arkolea, Cumberland Inlet and New Gummiute.* If, on taking on board all freights at the above named stations, the vessel has not sufficient quantity, say from six to seven hundred barrels, then our wages are to cease and we are to stop to whale at New Gummiute or elsewhere, and receive the lays set opposite our names on all catching taken after such date in lieu of wages; but if the quantity taken on board is sufficient to come home, *then our wages are to continue until arrival of vessel at New London, fall of 1884.*”

¶ The wages, under these articles, of the plaintiff Gallagher, a carpenter and blacksmith, were \$20 per month, and his “lay,” in the event of whaling, 1-100th of the produce of the voyage.

The wages of plaintiff Burdette were \$25 per month and 1-70th of the produce of the voyage.

The plaintiffs’ contention is, that the voyage of the *New Era* which, under these articles, they contracted to prosecute, should have determined for all purposes “at New London in the fall of 1884,” meaning within at least that year!

The defendant says such were not the meaning and intention of the contract, that that limitation applied only in case the freight taken on board was sufficient to come home, that if it were not so, the ship and the plaintiffs could be detained on a whaling voyage for a another year, and they say in evidence that a whaling voyage by sailing vessel ordinarily lasts sixteen to eighteen months, that the ship justifiably abandoned the freighting voyage in October and then entered upon a whaling voyage and that the plaintiffs were entitled after that to no remuneration beyond their “lays on all catching taken after that date in lieu of wages,” and that as nothing was caught the plaintiffs are entitled to nothing.

The defendant’s case further is, that all due diligence was used to perform the freighting voyage, that the delays were caused by bad weather and by the fact of taking on board a shipwrecked crew for New Gummiute.

The plaintiff’s case is, that the delays and deviations were

unjustifiable, and were caused by time lost in trading with the natives, by negligence and dissipation.

At the trial of these cases before me with special juries during the last term of this court, I held, for the purposes of the trial, that the agreement was open to be construed in the manner for which the defendants contended and subject to exception, I admitted *parol* evidence of what might be the length of the whaling voyage, which in certain events was contemplated by the agreement.

The plaintiffs gave evidence of the positive declaration of the defendant and his agents, made before the ship left the United States, that she was to return under any circumstances before the end of that year, 1884; that they were so informed by the captain in the course of the voyage, and that they positively got under weigh for home; but, moreover, that they were supplied with provisions for that length of voyage only, and were without lime juice, and by reason of the insufficiency of the provisions they were placed on short allowance during the winter, besides, afterwards on the way home, requiring help from another vessel and putting into St. John's for supplies, where they were asked at that time if they would enter into articles of agreement for another voyage north.

On the part of the defendant there was, besides the evidence to which I have referred, that of Captain Jackman, a steamship master engaged in the whale fishery, and an independent witness. He states that steamers never winter; that as a rule sailing vessels go for a year; that when the length of voyage is not described in the agreement a ship's provisioning would be a good guide as to the length of the voyage contemplated, and that he had never known an instance of a vessel engaged in freighting and whaling having remained over one season.

In directing the juries I held in effect on the whole case that under the articles of agreement the plaintiffs were engaged on wages for a given freighting voyage, which should have been in the ordinary course prosecuted to completion, and that the agreement was subject to the condition or defeasance, that when and if that voyage was completed within the defined period, the plaintiffs would be bound to prosecute a whaling voyage. The period of that voyage I left to the jury to determine upon the whole evidence, and if they found it should have been completed within the year 1884, and that the captain had unjustifiably failed to proceed with the freighting voyage and had improperly detained the plaintiffs in the Arctic

regions into another year, and that they had suffered from want of sufficient provisions, to find for the plaintiffs such reasonable remuneration for their services during their enforced detention as they might be entitled to, and taking their allowances in this respect into consideration, also to estimate the damages (if any) which their suffering from short provisions and the hardship of their detention might call for, and in this last regard I directed them not to take into consideration any detention necessarily occasioned by perils of the sea, or even any time lost *bona fide* in aiding a shipwrecked crew, and I even left it to the jury to say whether the conditions of the plaintiff's employment being changed and the relations of the parties altered to that extent, any new implied agreement became with the plaintiff's assent, substituted for the original terms where those terms ceased to be capable of application; whether it could be gathered from the circumstances, for instance that the men had assented to abandonment of the freighting voyage and wages and to a prolonged whaling voyage, and if so, upon what terms.

The jury in Gallagher's case found for the plaintiff wages to the time of his leaving defendant's service in St. John's, at the rate named in his articles amounting to \$184.80, and for special damage \$100.

The jury which tried Burdette's case found for wages only \$277.35.

The defendant obtained *rules nisi* for new trials upon the ground of the improper admission of evidence, and that the verdict was contrary to evidence, and for non-direction in not putting to the jury, "for that the jury should have been directed that under the agreement between plaintiff and defendant, if the defendant failed to procure from six hundred to seven hundred barrels of freight, either from such freight not being at Arkolea, Cumberland inlet and New Gummiute, or from causes beyond defendant's control, the defendant was obliged to prosecute a whaling voyage, and that plaintiff was entitled to wages only to the time when the failure to obtain such freight was ascertained."

The defendant's counsel, upon the only question of evidence so important as to call for any remark, in effect contends that although the defendant was, for the purpose of enabling him to explain his agreement according to his view as to the duration of the voyage, entitled to the use of *parol* evidence, (i. e., evidence of facts outside the agreement for the purpose of construing it, where it was silent or ambiguous), the plaintiffs

could not give effect to their interpretation in a similar manner, and by such testimony as that I have described.

In my judgment, none of the points of the defendant's rules can prevail. The only doubt that may exist is whether the articles of agreement did not, by their terms, expressly limit the voyage all round to "the fall of 1884," and whether the defendant should have had the advantage of any proof *dehors* the agreement as to the time for which the plaintiffs were engaged for the voyage inclusive of whaling.

I think that in Gallagher's case, the jury having found for full wages for the whole period of employment, has assessed a rather excessive amount for special damage in regard to a voyage upon which considerable hardship must be necessarily expected, and that a sum of \$25 extra instead of \$100 would meet the justice of his case, and reduction being made accordingly, I would say let these rules be discharged with costs.

Mr. McNeily, Q. C. and *Mr. R. McNeily*, for plaintiffs.

Sir W. V. Whiteway, Q. C. and *Mr. Johnson*, for defendant

IN RE JABEZ SAINT.

1886, *March*. HON. MR. JUSTICE PINSENT, D.C.L.

Insolvency—Vesting order—Property passing under assignment previous to master's report—Exception to.

On the hearing of the insolvency it appeared that a conveyance had been made by the insolvent of his property to his supplying merchant, but had not registered the same. The court ordered that such property as had come into the supplying merchant's possession previous to the vesting order, should pass to him. The question as to what property passed was referred to the master, to whose report exception was taken, principally on the ground that the quantity of property had not vested in the supplying merchant as reported, prior to the vesting order in insolvency.

Held—That a perfected delivery and possession of all goods accompanied the assignment when the supplying merchant's agent took charge, carrying with him a letter to insolvent to the effect "that you will vest in him all goods that you may have."

THE matter of this estate last came before this court in 1883, upon exceptions to the master's report.

It was then held that a conveyance to Messrs. Baine, Johnston & Co., (the insolvent's supplying merchants), had not been

duly registered, but that such of the property conveyed by it as had come into their possession, prior to the vesting order in insolvency, would pass to them to satisfy the terms of the assignment which was adjudged not to be fraudulent and void; and it was referred to the master to enquire and report what property had so passed to Baine, Johnston & Co., or otherwise, and generally to report upon the insolvent estate of Saint.

The master finds that all property received on Saint's premises, at Bonavista, prior to the vesting order of September the 9th, A D. 1880, was delivered to or in the possession or under the control of the defendants, (Baine, Johnston & Co.), and had vested in them; that upon property, "produce of the voyage," for the remainder of the year 1880, and otherwise, the defendants had realized for the benefit of the estate £81 6s. 9d.

The trustee and general creditors of Saint's estate except to this report, and the exceptions amount in effect to this, that the master was in error in reporting that the goods on Saint's premises, at Bonavista, had vested in the defendants prior to the vesting order in insolvency; and also that in breach of some arrangement between the trustee and the defendants, the latter had "forgiven or assumed to forgive" debts due the estate of Saint, and should be declared accountable and should account therefor.

There is no satisfactory evidence of any arrangement between the trustee and the defendants beyond this, that the defendants being in possession under a claim of title, should not be disturbed during the season of 1880, and should receive all that could be realized from the business and estate without prejudice to the rights of the trustee, to whom they would have to account if they received any assets belonging to Saint's insolvent estate; and if such was the arrangement, it appears to have been violated or disregarded by the trustees bringing an action in trover against the defendants to recover the property, the subject-matter of the conveyance.

The evidence of Grieve and others established, to the master's satisfaction, that, as might be expected from our experience of such matters, it was impossible to obtain by the voluntary action of the debtors of such insolvent estates, any money or produce to the credit of their old accounts beyond the sum reported, and that that sum is the result of Baine, Johnston and Co's continued trading for the year 1880, and would not itself have been realized, if the trade had been stopped.

As to Messrs. Baine, Johnston & Co. having "forgiven or

having assumed to forgive" any of the balances due by the dealers and debtors of Saint's estate, there is not a particle of evidence to support the exception.

The balances still remain due and unpaid, and so little seems to have been the value attached to them, or so great the indifference of persons to their own interests that neither the trustee nor the creditors have since the declaration of insolvency in 1880, taken the slightest trouble, or legal step of any kind to recover these balances or any part of them, or to sell the debts due the estate, valued, although they were, by the insolvent upon his examination before me on circuit at £6,000.

With regard to the exception touching the vesting in possession in Baine, Johnston & Co., of the properties conveyed to them, the history of the matter appears to be that in May, A D. 1880, Snelgrove, their agent, was sent to Bonavista to enter upon the premises and control the business of Saint.

I am of opinion, under the evidence, that at Snelgrove's first entering upon the management of Saint's business, his position and action did not carry with them possession of *all* the property of Saint at Bonavista, although (as the master reports), "Snelgrove gave receipts for the fish and oil in his own name; that he cast off dealers that Saint had supplied; that he kept all cash received, and that he had the keys of the premises, and had charge."

When, however, the conveyance of July came to be made, and Campbell, (the defendant's manager), was sent by the defendants to Bonavista with that assignment, and with the letter of Mr. Baine Grieve, (one of the defendants), accompanying the same, describing the deed as one "by which you will vest in him (the writer) all goods you may have, and the produce thereof in the shape of fish and oil, &c.," I am of opinion that a perfected delivery of all goods on the premises accompanied the assignment, and that the possession of the property, as well as the control of the business devolved upon Snelgrove, altho' the business was continued without change of name. The premises themselves, with other property, it will also be borne in mind, had already, by a prior and undisputed conveyance, become the legal property of the defendants.

Counsel for the creditors have pointed to the evidence of Snelgrove, (since deceased), as rather contravening this position, but upon careful consideration of his testimony, it is seen that the questions directed to him were rather upon the conduct of the business than the possession of the property, and

he seemed really not clearly to understand his own position or that of his principals.

Upon reference to my notes of evidence taken in this case upon the hearing of the application in insolvency in 1880, I find that Saint himself swore, "I have assigned all property to Baine, Johnston & Co., to secure their debt. They have carried on the business. I work with them in the old name. I give no receipts in our name. Snellgrove gives receipts. He is Baine, Johnston & Co's agent in charge."

The defendants are still creditors upon Saint's estate for several thousand pounds while the claims of general creditors amount to hundreds only.

I see no reason to disturb the master's report, but every reason for confirming it, but under all the circumstances the matter was a fair one for further investigation in the general interests, and let the costs of all parties to the reference (those of the master and of the trustee in the first place) be paid out of the estate.

Attorney General (Winter) and Mr. Kent. Q. C., for trustees and creditors.

Mr. Greene and Mr. Emerson for defendants.

IN RE WILL OF JOHN H. WARREN.

1886, *April*. CARTER, C. J.; PINSENT, J.

Will—Construction of—Codicil—Revocation—Adeemed legacy.

The testator, under his will, bequeathed to a legatee three certain bequests, all in one numbered clause of will, to the second of which was attached a proviso creating a charge. The property constituting the bequest to which this condition or charge was attached, was adeemed in the life of the testator, and the legatee claimed that the proviso or charge did not attach to the whole clause of the will or the remaining bequests, but only that bequest to which it was structurally attached.

Held—That although the three bequests were in one clause, they were separate and distinct, and the qualification or charge imported at the end of the second bequest extended to it alone. A confirmation of a will by a codicil does not revive an adeemed legacy. In construing a will the Court has regard to structure and punctuation.

THE testator, who had previously resided in this country, left it about the month of October, 1884, to reside in England,

where he died in the month of April, 1885, having made his last will and testament, by which, among other bequests, are the following, viz. :—

2.—I give, devise and bequeath to my dutiful son, Adolph George Warren, that piece of land situated on Rennie's Mill road, leading to Upper Long Pond, and lying north of the road leading up by Quigley's to Upper Long Pond road, and bounded south by land owned by my sister, Anne Warren, and called by me "Mount Warrenville" ;—

Also, all my household furniture, beds and bedding, plate and all other goods, chattels and effects now in my dwelling house, provided he comfortably supports his sister, Jane Elizabeth, with bed and board, and all essential comforts and requirements other than clothing, as long as she remains unmarried, or otherwise as she may desire, provided he allows and pays to her whilst unmarried and a spinster the sum of thirty pounds currency yearly ;—

Also, the sum of five hundred pounds currency or two thousand dollars.

Prior to his departure for England, the testator sold the furniture and the greater part of the chattels referred to in the above bequest and gave up possession of the house he had occupied. His son, the said Adolph Warren, married in January, 1884, and died about July, 1885, having made a will duly admitted to probate, and appointed the Hon James S. Winter, executor.

A question has arisen between those interested respecting the construction, or rather the application of the clauses referred to, from the sale of furniture and chattels by the testator, and its effect upon the proviso in favor of Miss Jane Warren, and the court is asked to give directions for the guidance of the parties.

Mr. Winter contends that the bequest of the furniture, &c., has been revoked by the sale ; that the provision for Miss Warren was alone dependent upon that bequest, and has consequently ceased to exist, and that the other bequests of the land and the five hundred pounds are absolute without any condition ; whilst the others interested in the estate, contend that the condition or proviso in favor of Miss Warren, attaches to all the named bequests.

The furniture realized £350 currency, and the estimated value of the land is about £250 currency, both Adolph and Miss Warren were living with their father when his will was made and she accompanied him to England.

There can be no question that by the sale of the furniture the bequest as to that was adeemed, and when there is a charge on a specific bequest if it be adeemed the charge is gone, *Couper vs. Mantell*, 22 Beav. 223.

I cannot perceive any ground whatever for shifting this charge on the bequest of the five hundred pounds, which is subsequent, separate, and absolute in terms, without reference, qualification or condition. Can it then be made to apply to the Warrenville land bequest, which immediately precedes the gift of the furniture? In construing a will, *L. J. Turner* says in *doe dem, Brodbelt vs. Thomson*, 12 Moo. P. C. C. 114, "It is upon intention either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced where surrounding circumstances can be called in aid, and not upon conjecture merely, that the court feels bound to proceed"; and in *Abbott vs. Middleton* 7 H. L. C. 68, Lord Cranworth says, "It is not the duty of a court of justice to search for the testator's meaning otherwise than by fairly interpreting the words he has used," or as Lord Wensleydale tersely says in the same case, "*what is that which he has written means*." Although the probate is conclusive as to what the words of the will are, yet the courts frequently examine the original will, which we did in this case, as in construing a will, marks of punctuation, as parenthesis, stops, capital letters, &c., may be taken into consideration. In *Gauntlett vs. Carter* 17 B. 586, a comma, was considered a circumstance of considerable importance. In *Compton vs. Blorham*, 2 Coll., 201, V. C. Bruce, sent for and examined the original will, and decided on the ground that "my monies," preceded by a colon stop, began an entirely new sentence. In *Child vs. Elsworth*, 2 D. M. & G., 679, there were several gifts of legacies the last gift followed by the words "to be paid twelve months after the decease of "A." The question was whether the directions for postponement of bequest applied to all the legacies. It was held to apply to all, because on examining the original will it was found that all the gifts, including the directions for time of payment, was written as one sentence and closed with a full stop. If the bequests of the land and furniture in this matter were written as one sentence the decision in *Child vs. Elsworth*, might be regarded as a case in point against Mr. Winter's contention, but on looking at the original will, of which I have been given a *fac simile*, it will be seen that these bequests are distinct, and in my opinion, as much so as if the legatee of "Mount Warrenville" were some other person than Adolph Warren. The red ink line between this bequest and "also," would appear to have been intended to mark it as separate and distinct from the gift of the furniture with its charge. Reasons might be assigned why the charge would be confined to the gift of the furniture

and chattels, and not to the other bequests, but as such would be merely speculative I shall forbear doing so. I am, therefore, of the opinion that the charge, provision, or trust, in favor of Miss Warren failed on the sale of the subject of the bequest, and that the other bequests are freed from it.

HON. MR. JUSTICE PINSENT:

The testator (John H. Warren) died abroad in April of last year, having duly made and executed a will in August, A. D. 1881, and afterwards a codicil in October, A. D. 1884.

The object of the testator in making the codicil, which commences with the expression "confirming said will," seems to have been only to revoke a small annuity given to an old servant under the will, and to provide for the executorship of his estate in the event of the death of the testator's son Adolph.

On behalf of Adolph's estate it is contended that section two contains three distinct and independent bequests, and that the second only, that relating to the furniture and effects in the dwelling house, has been adcmeced and was subject to the proviso.

Reference has been made to facts, such as the domestic circumstances of the testator and his two children, Jane and Adolph, at the time of the making of his will, in evidence of the application of the condition to the bequest of the chattels only, and also to the probable value of these effects as corresponding with the obligation for the support of Jane, or for an allowance to her of £30 a year.

Consistently with precedent and with consent of parties, view has been had of the original will and its structure and punctuation.

At the time of the execution of the will by the testator, his son (Adolph) and his daughter (Jane Elizabeth) lived with him at St. John's.

Adolph married, the testator left this country and went to England, where he died, having about the time of his departure from Newfoundland given up housekeeping and having sold the furniture and effects described in the second clause of section two of his will.

After the sale of those effects the before-mentioned codicil was made.

The petitioner and others contend that the three bequests in section two are subject to the proviso for the maintenance of

Jane Elizabeth, and that as the second, relating to the furniture, &c., was adeemed by the sale of the property, they all fall to the ground and are practically revoked.

I find that each bequest of section two is contained in a separate paragraph divided from the next by a dash in red ink at the end of the paragraph, and with a similar dash commencing the line of the next succeeding paragraph as in the extract given above, and that the word *also* commences with a capital letter. I also find that there are specific bequests to others, similarly set out in other parts of the will.

This case is, therefore, to be distinguished from *Child vs. Elsworth*, 2 D G., McN. & G., in which the will was looked at and the whole gift and its conditions were written continuously in one sentence; and from *Collings vs. Eucstace*, 4 M. & S., in which, although there were several bequests in one section, they were not separated in the manner of this will, and in which the words of limitation were in the final clause, and were held to comprehend and relate to all that had been previously bequeathed. Moreover, in the case last cited, the properties affected by the conditional words were *ejusdem generis*.

The present case is more like *Gower vs. Towers*, 26 Beav., 81, where it was held that the gifts were separate and distinct. There is, however, no case precisely analogous to the present one to be found; and, indeed, questions of this kind are, while subject to general principles, determined from the view of their own peculiarities and conditions.

I am of opinion regarding all the circumstances that the three bequests in section two of Warren's will are separate and distinct, and that the qualification imported at the end of the second clause extends to it alone; that only the bequest of the household effects was adeemed by the sale and change of circumstances, and that the bequests of land on Rennie's Mill road and of five hundred pounds are specific and unconditional legacies which go to the representatives of Adolph Warren, while they, on the other hand, take no interest in the fund realized by sale of the household effects, as the confirmation of a will by a codicil does not revive a legacy which has been adeemed.

The costs as between party and party should be paid out of the residuary estate.

Sir W. V. Whitway, Q. C., and Mr. Johnson, for petitioner and others.

Attorney General (Mr. Winter) and Mr. Morison, for the representatives of Adolph Warren.

1886, *May*. LITTLE, J.; PINSENT, J.

Pleadings—Demurrer—Bill of Lading—Contract—Breach of—Negligence—Damages.

Certain goods which were being carried under a contract of affreightment, became damaged. The owner sued for damages, alleging negligence. As an answer, the bill of lading was pleaded, containing certain exceptions limiting the carriers liability. This plea was demurred to, on the grounds that it did not disclose the fact that the damage came under any of the exceptions in the bill of lading.

Held—That the defendants were not called on to allege the particular cause from which the damage arose. They satisfy the practice in setting forth the exceptions which qualify their liability.

In this case the declaration contains two counts, setting out that by their bill of lading the defendants undertook and agreed to take and carry on board their ship the *Phœnician* certain goods of the plaintiffs from Glasgow, and deliver the same in good order and condition at St. John's, "certain perils and casualties excepted," and "that defendants so negligently carried said goods so shipped on said voyage, that they were greatly damaged and rendered of no use to the plaintiffs."

The defendants by their pleas set out the alleged agreement or contract of affreightment, containing conditions and exceptions purporting to relieve them of liability for losses and injuries to said goods occurring and arising from certain causes therein specified and set out in their pleas. They further alleged that the damage complained of was, and is one which, by the terms of their said contract, the defendants are not liable to make good to the plaintiffs, and for which they are not in any way answerable in this action.

The plaintiffs demur to this plea on the ground that the defendants do not set forth any matter or matters of fact which shew that the damage occasioned to the said goods came within any of the exceptions pleaded by them. In other words, the plaintiffs require the defendants to define the cause and nature of the alleged damage and thereby shew it was not covered by the exceptions set out in their contract.

In my opinion the pleas so demurred to are sufficient; that under the declaration which charges generally the defendants with negligence, the defendants are justified in setting out the exceptions and conditions qualifying their responsibility and obligations as such carriers, and were not required or called on

to go further, and allege that the loss or damage complained of arose from any one of the causes set out in these exceptions.

In support of this position I find it was so held in the case of *Wyld v. Pickford, M. & Ws. reports, v. 8, p. 459*; noted also in *Brown on Carriers, p. 517*, where the defendants were sued as carriers, and did not take as alleged, *due and proper care of the goods entrusted to them*. One of the defendant's pleas was that defendants had received the goods upon certain terms and conditions, of which plaintiffs had notice, &c., but did not comply therewith. Objection having been taken to the sufficiency of the pleading, it was ruled, *inter alia*, that as the declaration might apply to any kind of negligence, it was not necessary to allege in the plea that the loss was occasioned by such negligence as the defendants were not responsible for. *Parke, B.*, there considered the proper answer to the plaintiffs objection was that such negligence should have been replied to or stated by way of replication or new assignment. The necessity of fining down all general statements in the pleadings to a definite, clear, and ascertained issue to facilitate the trial and adjudication of disputes is apparent and properly imposed as an indispensable rule to be observed in pleading. But I do not consider the course adopted by the plaintiffs by demurring will lead to that desirable end, or that they are obliged from the present state of the pleadings to demur in order to place the ground of their action clearly on the record. In my opinion they might do so in their replication without departing from the substance of their declaration. I consider the defendants should not be obliged, at present, to amend their pleadings by affirming and particularly defining the cause of the alleged damage complained of by the plaintiffs; and that no sufficient grounds are present on the pleadings to support the plaintiffs in their demurrer to the pleas filed by defendants.

HON. MR. JUSTICE PINSENT:

I am of opinion, upon the authority of *Wyld v. Pickford* and other cases, that the view of the matter taken by Mr Justice Little is correct, and that the defendants are entitled to judgment upon demurrer, with leave to the plaintiffs to plead over upon the usual terms.

Attorney General and *Mr. Morison* for plaintiffs.

Sir W. V. Whiteaway and *Mr. Johnson* for defendants.

1886, May. HON. MR. JUSTICE PINSENT, D.C.L.

License Acts—Magistrate's decision—New evidence—Appeal.

Where a party having been convicted of a breach of the License Act, on the evidence of a hired informer, appealed from the magistrate's decision and tendered the evidence of the informer to contradict what he had sworn to in the Court below, and also evidence of witnesses not previously called.

Held—That to establish such a practice would be to encourage perjury and the getting up of corrupt defenses. A case may be remitted back on the discovery of important evidence not available before. It would be unfair to reverse a decision on evidence which the tribunal convicting had no opportunity of considering.

MR. WOOD appeared for appellant Thomey, who had been convicted and fined \$50. He excepted upon the ground that the finding was contrary to evidence; that the principal witness (a hired informer) was now ready to swear that he had before sworn falsely; and that there were other witnesses to show that he had done so.

I am asked for the first time to establish the precedent of permitting, on an appeal of this nature, a witness, who swore to one thing in the court below, to be now examined here for the purpose of declaring that he had before perjured himself, and also to hear other witnesses who might have been examined on the trial of the original complaint.

I must decline to permit any such dangerous practice. In the first place, how am I to know whether the self-accusing witness told the truth then or is about to tell it now? His testimony would be now worthless. To allow the re-production of this witness, and the examination of fresh ones who in this case were available before, would be merely an encouragement to perjury and subornation of perjury and the getting up of corrupt defences after a lapse of months. Moreover, it would be unfair to the original tribunal to allow its decision to be reversed on appeal upon evidence which it had never had an opportunity of considering. A case might, under rare circumstances, be remitted back if justice required it, from discovery of important evidence not before available.

Now, with regard to the decision itself, the Supreme Court has already held on several occasions that it would not interfere with the decision of a magistrate upon *matters of fact* unless his judgment was, on the face of the testimony, so grossly unjust or perverse that it could in no view be reasonably upheld. In fact the Court of Appeal regulates itself in

such cases on similar principles to those which affects it in dealing with the verdict of a jury. The magistrate of experience and familiar acquaintance with local circumstances and persons must generally be taken to be the best judge of the evidence in such cases. The present conviction was amply sustained by the evidence he had before him, and it appears that this is the third conviction against the same person.

His Lordship concluded by suggesting that, if as a matter of fact an injustice had been done through the perjured testimony of the informer, it was open to the appellant to lay a complaint against him and have him prosecuted for perjury; and, no doubt, if that prosecution were followed to conviction the Crown would, at least the judge would recommend, that the Crown should remit to the appellant the fine imposed upon him. The appeal must be dismissed, but without costs, as the complaint has been made upon the information of a hired informer.

Mr. Wood for appellant.

Mr. Morison for Constable Forward.

DORAN *v.* POWER.

1886, *June*. PINSENT, J.; LITTLE, J.

Fisheries Act—Construction of—Setting net moorings—Appeal.

Where a party, in accordance with the provisions of the Coast Fisheries Act, set his moorings and cod-net, but fearing injury from ice took in his net, leaving his moorings, which were afterwards carried away by stress of weather. Shortly after other moorings were set in the same place by another party. The first party to occupy the ground claimed in an action against the second party that he had the right to return as he did and reset the trap so taken up.

Held—That under the case as stated the first party lost and never after acquired his original place as against an intervener.

THIS is a case stated for the opinion of this court upon the construction of the ninth section of the 47th Vic., cap. 8, "An Act to amend the law relating to the Coast Fisheries."

The facts are shortly these: plaintiff set his moorings and cod-net on the 20th of April, and on the 25th, apprehending damage from drift ice, he removed his net, leaving his moorings.

It appears from the case that any visible evidences of these moorings disappeared before the 5th of May, although the plaintiff contends that some of them continued there sunk.

On the morning of that day the defendant set moorings in the place so previously occupied by the plaintiff. Subsequently, on the same morning, plaintiff proceeded to the spot and there reset his moorings, claiming the place by virtue of previous occupation. Power, however, proceeded to moor his net to the exclusion of Doran.

On the 7th of May, by reason of ice, Power took up his net, leaving his mooring. He reset his net on the 10th. Doran (the plaintiff) set his net close by on the 11th, and prosecutes Power (defendant) for interfering with his rights, acquired, as he contends, under the ninth section, by reason of his prior occupation commenced on the 20th of April and resumed on the 5th of May.

The magistrates hold that the plaintiff, having removed his net from fear of danger from ice, the cod-net not having suffered damage, and consequently not having been "taken up for the purpose of repairs," and the signs of mooring having disappeared from the surface, lost his right to the place as against another succeeding in afterwards first setting out his moorings there.

Moreover, they hold that the plaintiff failed to set out his net within the four days limited by the ninth section.

With the matters of fact we have no concern so long at least as there was evidence upon which to adjudge one way or the other.

What we are asked to decide as a matter of law is, whether a person having taken his chance of the weather and other conditions, and as a matter of personal judgment, fearing damage from ice, having removed his nets and afterwards lost sight of his moorings, can claim the right of return to the place as against another having the luck to precede him in setting out other moorings.

The section nine is as follows:—

"IX.—If any person shall set out moorings on any of the fishing grounds of this colony or its dependencies in order to secure the place where such moorings are set for the setting of any of his cod-traps, cod-nets, or bultows, and such person shall fail to set such cod-traps, cod-nets, or bultows in such place within four days after setting out such moorings, it shall be lawful for any other person who may desire to secure the place where such moorings are set for the setting of his cod-traps, cod-nets, or

bultows, to remove such moorings, and there to set his own moorings, or cod-traps, cod-nets, or bultows, and thereupon such person shall in his turn become liable to the provisions of this section: Provided, that if any person, after setting any moorings, shall be *bona fide* prevented by stress of weather from setting his cod-traps, cod-nets, or bultows within the said four days, such period shall be computed from the time at which the weather shall admit of his setting such cod-traps, cod-nets, or bultows: Poovided also, that when any person, having set a cod-trap, cod-net, or bultow, the same shall become damaged to an extent rendering it necessary that it be taken up for the purpose of repairs, he shall not thereby forfeit his right to reset his cod-trap, cod-net, or bultow in the place from whence it has been taken up."

The court is of opinion that the view taken by the magistrates of the construction of the section is correct, in so far as the reciprocal rights of the parties would be civilly affected, and that, under the case as stated, the plaintiff lost and never after re-acquired his original place as against an intervener; but on looking into the Act we fail to discover where provision is made for any penal proceeding in the nature of the complaint set out in the case, which runs as follows:

"For that the plaintiff was entitled under the terms of section 9 of Act 47 Vic., cap. 8, to a certain place in or near Outer Cove in the said district, for setting his cod-net, but the defendant unlawfully took and occupied such place, and there so set his cod-net as to hinder and prevent the plaintiff from using the said place for his fishery, contrary to the form of the statute."

Now, the tenth section of the Act provides that "any person who shall violate any of the provisions of this Act shall be subject to a penalty not exceeding \$50, and all nets and contrivances set contrary to the provisions of this Act shall be forfeited, &c."

The ninth section, under which this complaint is said to be made, prescribes and defines the previously uncertain or undefined rights of parties in the sea in some particulars during the prosecution of the fisheries, and contains no provision for the violation of which any person shall be subject to a penalty upon complaint before a magistrate.

This section is declaratory, not penal

The eighth section describes the criminal offence, which prohibits the setting of cod-nets in other than certain positions with regard to cod-traps and other cod-nets, and there are several other provisions of a like kind in other sections, the violation of which may be the subject of penal proceedings.

It is impossible for us to overlook the radical defect in the proceedings brought under our notice here, and we have to

direct that the magistrates have no criminal jurisdiction in the case before them, that it does not come within the penal provisions of the statute.

Mr. Johnson for plaintiff.

Mr. Carty for defendant.

IN RE TUCKER, ET AL., EX PARTE MARINE
INSURANCE CLUB.

1886, *June*. HON. MR. JUSTICE PINSENT, D.C.L.

Insolvency—Insurance Club rules—Exceptions, master's report on—Contribution of trustee to Club—Preferential claim.

One of the rules of a Mutual Marine Insurance Club provided that "the club would have a lien on each vessel insured for a proportion of all losses for the year." The insolvent was owner of three vessels, but the trustees of his estate refused to pay the contribution as preferential, but offered the ordinary dividend. On an *ex parte* hearing,

Held—That such a lien or charge must fail. That it is not in the nature of an equitable mortgage. That it is an uncertain contract, ambiguous, and not capable of being enforced. To give effect to such a contract would be contrary to the policy of the Merchants' Shipping Acts.

THIS matter comes before us upon an exception to the master's report, viz. :

"That the master ought to have reported that the third rule of the club creates a charge upon the vessels the property of the estate, insured in the club, and upon the proceeds of the sale of the vessel, such as would be enforced in equity."

There had been a reference of accounts and of the claims upon the estate to the master, and it appeared that upon the declaration of insolvency, Messrs. Tucker and Cameron owned and possessed three vessels, the *Iona*, the *Pioneer*, and the *Friend of Fogo*, insured in the year 1883 in the Mutual Insurance Club of Conception Bay.

Several vessels insured in that club in the same year were lost, and the proportion of contribution to which the insolvents were liable on account of the above-named three vessels, so insured by them, amounted to £78 12s. 10d.

The club declined to accept the general dividend declared by the insolvent estate, and claimed to be entitled to payment in full upon the ground that they possessed in the three ships

which formed part of the assets of the estate an interest which would be enforced preferentially as an equitable charge or lien, and that they were consequently entitled to be paid in full out of the proceeds realized by those ships.

For that purpose the club relies upon the concluding clause of its third rule, which, after setting out the reciprocal liabilities of members of the club to pay their proportions of losses according to the valuation of the vessels insured, provides as follows:

"And for all contributions required under this rule the society shall have a lien on each vessel for her respective proportion of all losses."

This ingenious attempt to create interchangeably a lien or charge in favor of all contributing members of the club upon the vessels owned by such of the underwriters as had not themselves suffered loss is in my judgment one which for various reasons must fail.

It is contended that the clause amounts in effect to an equitable mortgage; that for instance, a purchaser with notice of this rule, would be bound by it and would take his property in the ship of a contributing owner, subject to the liability of the vendor to pay his proportion of the general losses; and that a court of equity would decree some sort of specific performance which would affect the corpus of the ship or her specific proceeds.

There are preliminary objections which are fatal to this contention.

To enable a court of equity to recognize a charge of that kind for its enforcement, the contract must be certain and unambiguous, and such as could effectually be carried out by reference to the clear meaning and intention of the parties.

Here, while the contract professes to create a lien which is to operate *in futuro*, and is contingent upon accidental circumstances, and upon the observance or non-observance, the failure, or otherwise of a variety of stipulations which appear in the rules of the club, it is silent as to the manner in which the charge is to be constituted and as to what form and fashion it is to take.

Moreover, it is attended with the almost insuperable difficulty that to give effect to it at all, there must be a conveyance of his ships by every underwriter to all the others, and that during the whole period of insurance the owners and all others

would be practically debarred from any disposition of the right of property in the ships

Again, in this case the specific performance is sought when it has ceased to be possible to place all the parties concerned in the condition for which it is assumed they stipulated at the time of entering into the agreement, as several vessels have been lost, and many others, no doubt, have changed hands or have been otherwise encumbered.

But assuming that it was possible to overcome these objections, which to my mind are fatal and sufficient to dispose of the case, it is contended that there would be nothing contrary to the policy of the Merchant Shipping Acts in giving effect to the contract, as equitable interests in ships are now as between parties in privity expressly recognized and reserved, and that the trustees in insolvency could take no greater property than was possessed by the insolvent himself, and that they take subject to the equities which would have been enforced against him.

True it is that by the terms of the present Merchant Shipping Acts, which are of universal application to British shipping, that without prejudice to the powers of legal disposition contained in the statutes, "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property," 25 & 26 Vic., *cap. 63, sec. 3*; and under these provisions it has been held that simple equitable assignments, even by deposit of title deeds with notice, will prevail against assignees in bankruptcy, in cases in which the property is not in the order and disposition of the bankrupt at the time of the bankruptcy.

While, however, such equities are recognized under the provisions of the Merchant Shipping Act, it must be observed that these Acts, while they provide strictly for the *legal* transfer and devolution of property in ships, nowhere prescribe the extent or define the limits of the equitable rights which may prevail by virtue of the reservations so made in the statutes.

This is left to the exercise of the equitable jurisdiction having control over the parties and the subject-matter; and thus it is that courts of equity hold under the application of the statutory bankruptcy law in England that assignees in bankruptcy take the property of the bankrupt subject to existing equitable rights.

With equal reason such claims in equity are here in cases of declarations in insolvency subject to the provisions of our insolvent law and of our registration acts, so far as the latter are to be read with the former.

There must be judgment against the claim of the Marine Insurance Club for payment in full of the insolvents' contributory proportions of losses upon ships in the year 1883.

The Attorney General (Winter), for the club.

Mr. McNelly, Q. C., for the insolvent estate.

IN RE JAMES JOY.

1886, June. HON MR. JUSTICE LITTLE.

*Insolvency—Petition for—Property of insolvent previously mortgaged to petitioner—
Title—Misrepresentation.*

The mortgagor to secure to his merchant payment of a large indebtedness mortgaged his property situate in the Dominion of Canada, the mortgagor to remain in possession and pay off consideration in five years. The law agents of the mortgagees at Quebec advised after execution of mortgage that the title of property conveyed was defective. The mortgagees petitioned for the mortgagors insolvency, treating the mortgage as a nullity.

Held—That opinions of counsel are wholly insufficient to sustain charge of misrepresentation of title, and do not warrant mortgagees in treating their deed as a nullity and thus enabling them to treat the mortgagors indebtedness as one recoverable in *proesenti*. Petition dismissed.

In this matter an application has been made on the petition of George A. Hutchings, acting as agent and on behalf of Messrs. Job Brothers, supplying merchants, to have Captain James Joy, their planter, declared insolvent, under and by virtue of the provisions of title 25, cap. 20, Consolidated Statutes.

From the said petition and schedule it appeared that Joy was indebted to Job Brothers & Company in the sum of £5,800, or \$23,200 00, and his assets were estimated at the probable value of £1,294, or \$5,177.00; on this statement and on motion of counsel the usual provisional order was made for the hearing of the inquiry and the examination of the parties interested.

In the course of the lengthened examination of Mr. Hutchings, it was shown that Joy had been supplied by Job Brothers for

the past twelve or fifteen years, in the carrying on and prosecution of an extensive fishery at and from Cariboo Island, situate in the Straits of Belle Isle, and within the territory of the Dominion of Canada; that all of the lands, chattels, and effects stated in the schedule, comprising the assets of Joy, were at Cariboo, and consequently without the jurisdiction of the supreme court of this island.

The only creditors claiming against Joy were Messrs. Job Brothers in the present application, and from the evidence in support of the petition and counsel's statements, it appeared that on or about the 21st day of December last there was an adjustment of accounts between the parties and a final arrangement arrived at for the liquidation of a compromise of Joy's indebtedness, the terms and conditions of which were reduced to writing and embodied in a deed of mortgage duly entered into and executed by them.

The position and relations of the parties under this mortgage are clearly defined, and nineteen thousand two hundred dollars was the agreed amount of the indebtedness of Joy before entering into the mortgage.

On reference to the deed of mortgage it is found that to secure the payment of the then agreed indebtedness to the mortgagees, and in consideration of further advances to the extent of four thousand dollars to be made by them to him, the mortgagor covenanted and agreed to re-pay the whole amount at the expiry of five years from the date of the deed, and as a security therefor assigned and conveyed his interest in the land, fishing-room and chattels then owned by him, and situate at Cariboo Island. The mortgage contains all the usual covenants for good title and further assurance, &c., &c., and provides that, until default should be made in the payment of said indebtedness, the mortgagor was to remain in possession of the mortgaged premises.

It further appeared in evidence that after the execution of this mortgage by all the parties, it was transmitted by the mortgagee for the purposes of registration in the proper office or department at Quebec, the lands and chattels, as was alleged, being within that county in Canada.

The law agents of the mortgagees at Quebec, on the receipt of the mortgage, communicated with them, and, as is stated, entertained an unfavorable opinion of the title of the mortgagor to the property so conveyed, and regarded it as wholly insecure and insufficient. Thereupon the mortgagees considered they

were justified in treating the deed as a nullity, and all arrangements, undertakings and covenants thereby made and entered into are considered by them as of no further force, value, or effect, and that the parties were relegated to the position of debtor and creditor, which they held towards each other before the execution of the deed. They also considered they were justified, without further proceedings on the deed, to make this application in insolvency in the protection of their interests and the security, for the benefit of the creditors, of the property and assets of the mortgagor.

To support a charge of misrepresentation as to title, and the consequent alleged want of consideration for entering into the agreement as embodied in the mortgage, an application is now made for an order for a commission to issue, under which evidence of professional legal *experts* may be obtained in Canada.

Pending these proceedings in insolvency, it appears an action at law has been brought by Joy, in which all the matters and claims now in question, and the rights of the parties both in law and equity, will form the subject of contention and final adjudication.

From the deeds produced by the parties at this hearing Joy appears to have purchased the land and fishing-room in question from the Ladies' Missionary Association, of Zion Church in Montreal, some twelve or fifteen years ago, and to have leased a portion of it to the mortgagees, who have there erected buildings and valuable machinery for the manufacture of fish manure, and no question of title has been raised nor has anything occurred to disturb the parties in the quiet and full possession of the property.

And from the character of the pleadings, already the subject of argument in that cause by counsel before the judges, it is manifest a commission will be moved for to obtain the evidence now sought for.

Under all of these circumstances and on view of the evidence, both oral and documentary, produced in the course of these proceedings, I do not consider I am justified in further continuing the inquiry into the alleged insolvency of this party under the petition now on file. I cannot agree in the view taken by petitioners of the position they now assume to hold towards the mortgagor in consequence of the representations of their legal advisers in Canada on the title of Joy to the land, &c., conveyed to them. These opinions of counsel are wholly insufficient to sustain the charge of misrepresentation

as to title, and do not warrant the petitioners in ignoring their deed and regarding the debt as one recoverable in *presenti*, nor would this alleged indebtedness alone justify proceedings in insolvency, and, so far as their interests are concerned, no order made in this application could vest the right and title in the Cariboo Island property in them, it being outside the jurisdiction of our courts of law.

I cannot, on the evidence adduced, or on that suggested as available, recognise any power or authority vested in a judge acting under the provisions of our laws on insolvency which would justify him in setting aside that deed of mortgage, so deliberately entered into and so solemnly executed, and by declaring it a nullity enable him to place the parties in the original position they held as simple debtor and creditor.

In rescinding the order granted originally on the grounds set out in the petition and discontinuing these proceedings in insolvency, I might express my regret that the parties should now cast aside the amicable business relations existing for such a number of years, and the friendly spirit which evidently actuated them in entering into a provident and satisfactory arrangement, which, if carried out in good faith, would apparently be for their mutual benefit and advantage.

I trust they may see their way to an adjustment of their present differences, and thereby save themselves from the annoyances and costs involved in the protracted litigation sure to follow on the course now evidently contemplated by both sides.

I reserve the question of costs for further consideration.

I shall sign the formal order for discharging the petition and order, when prepared by counsel.

Mr. Kent, Q. C., for petitioner.

Sir W. V. Whiteway, Q. C., for James Joy.

1886, August. LITTLE, J.; PINSENT, J.

Employer's liability—Negligence and incompetency fellow-servants—Common employment—Contributory negligence—Negligence of employer—Damages.

A workman engaged on a steam scow had his foot taken off whilst in the execution of his duty, through failure on the part of his employer to select competent fellow-servants and superintendents. In an action for damages a jury found a verdict for \$1,000. On motion to have verdict set aside on the grounds that the accident arose from the act of a fellow-servant in the course of a common employment, and non-culpability on part of employer.

Held—That where the employer retains incompetent and unqualified servants and an accident occurs he is responsible to his employee, though not so under ordinary circumstances, when the act is by his fellow-servant. When the employee entered the service he did not undertake to run extraordinary risks such as had led to the injury complained of.

In this case the plaintiff, Thomas Bulger, brought his action against the defendants to recover damages for an injury sustained by him whilst engaged in the discharge of his duties as the servant of defendants.

The declaration contained two counts and set out "that plaintiff became servant to the defendants, as attendant with others, upon the working of a certain steam pile-driver upon their dock in St. John's; that defendants should take due and ordinary care not to expose the plaintiff to extraordinary danger and risk in the course of his services. Yet the defendants did not take such care, but so negligently, by themselves and their servants, worked and operated the said pile-driver that a wheel of the same came into violent contact with plaintiff's leg, and broke and shattered it so as to necessitate the amputation of the leg, whereby, &c."

Also, that, &c., it was the duty of defendants "to take proper and reasonable care and precaution in the selection and retaining of competent servants and workmen employed in the operation of the said pile-driver; but, regardless of the premises and their duty in that behalf, defendants did not take such reasonable proper care and precaution in such selection, &c., whereby and by reason of the negligence and incompetency of defendant's servants and workmen, the plaintiff whilst in the performance of his duty was greatly injured, &c., by the machinery of said pile-driver, &c."

To these counts the defendant pleaded the general issue, and that plaintiff was not their servant.

The action was tried before me with a special jury.

From the evidence adduced on the trial in support of the plaintiff's case, it appeared he was engaged by defendants in the month of May, 1883, to work about the dock the defendants were then engaged in constructing at Riverhead, in the harbor of St. John's. He was, &c, * * * * * then he was placed on board a scow or barge, on which there was a steam engine used for the purpose of pile-driving, and was there engaged in moving the scow, hooking on piles, and other work. A foreman, named Palmer, directed the labors of plaintiff and other workmen so engaged.

Defendants had an experienced pile-driver named Carmody, brought from New York, and placed in charge on board the scow to run the engine by which a large hammer, a ton in weight, was operated and used in driving home the piles, as they would be arranged and placed in position by Palmer.

Plaintiff stated he worked on the scow for four months.—Carmody during that time "broke in" or instructed four or five "green" or inexperienced men as pile-drivers, and these subsequently took charge of separate pile-driving machines, similar to that on the scow. The plaintiff observed that Carmody, when instructing these men, would take hold of the throttle of the engine and the lever of the drum and have the pile hoisted, entered in ground, struck it a few times with the hammer, and then allowed the man he was breaking in to take his place and complete the work of driving the pile. Plaintiff did not consider his own position on the scow as a laborer as attendant with any risk, excepting when these men, or green hands, were being broken in to their work. It required skilled persons to control and manage the engine and pile-driver. If the men at the engine were not sufficiently vigilant and active, the rope attached to the hammer would get slack on the pile being struck, and probably catch around the engine and endanger the safety of one in the vicinity of the engine. The plaintiff saw this occur whilst two of the green hands were being instructed, but never when Carmody was running the engine. * * * This was the risk or danger to be guarded against. * * * There were six or seven hands or laborers engaged with the plaintiff on the deck of the scow, who were under the orders of Palmer.

* * * * *

The plaintiff and his fellow-laborers on the scow received as wages \$1.00 per day; Carmody received \$3.50, and these com-

petent to manage or drive the engine and pile-driver received \$1.20 a day.

The plaintiff was so engaged from the month of May, 1883, as a laborer in and about the works and for over three months on the scow, up to the 7th day of September of that year, when it appeared that one Ruthven, employed by defendants, was, in the forenoon of that day, as a "green hand," engaged in running the engine on board the scow; Carmody was sitting outside the engine-house, but near the engine, instructing or "breaking in" Ruthven as a pile driver, when the latter allowed the engine to "hang on the centre," that is to say, the piston rod, from an insufficiency of motion in the fly wheel, ceased to work either backward or forward, and remained in a horizontal position, and by so remaining or hanging on the centre the engine ceased to act; to set it in motion again the fly wheel had to be turned half way round with the hand, and whilst this was being done steam should have been shut off, otherwise with steam turned on the person so turning the fly wheel might be unable to get clear of it, and in danger of being injured in throwing the "engine off the centre."

It appeared this would occur with Carmody himself as well as with others who worked the engine, and plaintiff had been frequently directed by Carmody, and, as he swore, sometimes by Palmer, to attend and "throw the engine off the centre," that is, to half turn the fly wheel and again set the piston rod in motion. In doing this he would sometimes use his hand and foot in the same manner in which he saw Carmody do it, and at times he succeeded in doing it with his hand alone. Plaintiff deposed that he fulfilled this task successfully over a hundred times whilst he was on the scow, and on this occasion Carmody called out to him by name, "Tom, heave the engine off the centre." Plaintiff immediately turned and saw that Ruthven had been endeavoring to raise the hammer, which was suspended at the time between the top of the derrick and the top of a pile then being driven. Carmody was only a few feet from the engine, and plaintiff in obeying the order acted precisely as he had done on previous occasions, but Ruthven, instead of turning off steam as had been done by Carmody, Palmer and others when engaged in the same work, failed to do so, and plaintiff's foot was caught in the fly wheel and instantly broken off above the ankle. Plaintiff was thereupon carried to hospital; his foot had to be amputated. The defendants defrayed the medical and hospital charges, and furnished

plaintiff with an artificial leg, imported by them at considerable expense. Plaintiff on being able again to move about was employed by defendants about their dock premises until late in December, when, owing to some misunderstanding or from a desire to curtail expenses, they discharged him, although, as he alleged, defendants had promised to retain him in their services as long as they would have charge of the dock at Saint John's, &c. * * * That two of the defendants were, from time to time, about the place and in the vicinity of the scow, looking after the prosecution of the work as it progressed. Immediately the accident occurred, Carmody sprang from his seat and shut off the steam, removing Ruthven from the engine, and telling him at the same time "that he, Ruthven, had taken off Plaintiff's leg."

The plaintiff deposed that he is about 25 years of age, and is the sole support of a widowed mother and two sisters.

These were the principal facts deposed to by plaintiff, and were supported by the testimony of the witnesses called and examined on his behalf, viz.: Step'n Rogers, Abraham Anthony, Patrick Turner, and William Steers.

At the close of the plaintiff's case, Mr. Kent, Q. C., moved for a non-suit upon the grounds hereinafter particularly set forth, and leave was reserved to move for a rule embodying these exceptions, but in the meantime the Court considered the case should be proceeded with. The learned counsel addressed the jury, and then proceeded with the evidence for the defence.

This evidence was set out in examinations *de bene esse*, of William E. Simpson, one of the defendants, Henry W. Cook, laborer, and the oral testimony of Joseph Hatcher. Mr. Simpson stated Carmody was a certificated engineer, and thoroughly competent and reliable in every way, and duly qualified to take charge of any engine. He had charge of the machine on the scow on which plaintiff was working when the accident occurred; was aware of Ruthven being engaged on board the pile-driver; entered into no agreement whatever with the plaintiff after he came from hospital to resume work, to give him constant employment, nor was any promise or understanding made with plaintiff to provide for him in any way. Plaintiff had stated to defendant, and also to Cook, that if he, plaintiff, had not been in liquor he would not have lost his leg. Carmody was not directed or appointed to train or "break in" pile-drivers; could not say if Ruthven had been broken in as a pile

driver on the dock. The plaintiff had no right to have anything to do with the engine. No one but Carmody should have the control of the engine. Defendant was not present, but Carmody reported to him that plaintiff, without being ordered, "attempted to turn the engine off the centre, (*steam being shut off at the throttle*), using his foot on the wheel in which it was caught and dislocated at the joint, &c. The order was given to Joseph Hatcher, the foreman, and before he could attend, plaintiff had volunteered and the accident occurred." Defendants had six foremen in the works and did not require to have green hands broken in as pile drivers. Ruthven was engaged in running the engine in hoisting mud out of the dock; several hands were broken in to run the engine, that is, they were put under competent engineers to be taught the running of engines, but pile-driving was a trade in itself. Plaintiff was directly under the authority of Palmer. Carmody's orders were to allow no man to interfere with the engine. Defendants paid plaintiff his full wages whilst he was ill, defrayed medical charges and cost of artificial leg.

The witness, Cook, saw Carmody breaking in Ruthven, or instructing him how to run the engine, but not in pile-driving, and that plaintiff stated that if he had not been in liquor he would not have lost his leg.

The purport of the testimony of Hatcher was, that he was the fireman at the engine referred to; * * * * * that Ruthven, who was being instructed by Carmody, held the throttle at the time of the accident; the throttle was then shut, but steam may have been in the throttle on engine being caught in the centre. Carmody gave him, Hatcher, the order to "heave her off the centre," and did not order the plaintiff to do so; before Hatcher could do it plaintiff interposed, put his foot in the spoke of the fly wheel; his leg was broken off by his so interfering. Plaintiff was frequently desired by him not to interfere with the engine; plaintiff frequently threw the engine off the centre, and others on the scow also did so, at the instance of the engineer in charge; "Ruthven, after the accident, was placed on another engine to pile drive;" that plaintiff was as sober on the day of the accident as he was when he gave his evidence, and witness never saw the sign of liquor on him.

This comprised the evidence for defendants, and in sending the case to the jury the judge fully reviewed and commented on the evidence, and directed (*inter alia*) that if, from a due

consideration of the evidence and circumstances, they were satisfied that the plaintiff contributed by his negligence or misconduct to bring about this accident, or if it was caused by the negligence of his fellow-servant, and was one of the risks plaintiff undertook to run in entering defendant's service, or if the plaintiff went outside the scope or line of his duty, and without orders, voluntarily interfered with the engine, and by reason thereof the misfortune occurred, their finding should be in favor of defendants. But if they should consider it was solely brought about by and through the want of skill and incompetence of defendant's hired servant in the performance of his duty and execution of defendants' orders, their finding should be for the plaintiff, &c., &c. The attention of the jury was also drawn to the nature of the different counts in the declaration, and the operation or application to these counts respectively of any verdict they might arrive at.

The jury returned a verdict for defendants on the first count and \$1,000 for plaintiff on the second count.

Subsequently the defendant's counsel took a rule for entering a judgment of non-suit, or for the pending of a new trial on the grounds: 1st. That the plaintiff could not recover against the defendant, as he and the person charged as guilty of the alleged negligence were fellow-servants engaged in a common employment, and there was no proof of a special contract between plaintiff and defendants which would give him a status different from others occupying a similar position; 2nd. There was shown no personal interference of the defendants, or any of them, in the work at the time of the accident; 3rd. That there was not on the plaintiff's part any affirmative evidence of negligence on the part of the defendants on the hiring of the fellow-servant charged with negligence; 4th. That there was no evidence of the incompetency of the fellow-servant; and his grounds for a new trial were: that evidence was improperly admitted, the verdict was contrary to evidence, and the damages excessive.

This rule was argued during the last post terminal sittings, and after much consideration we have arrived at the conclusion that there was sufficient evidence to justify the jury in finding a verdict in favor of the plaintiff. We fully appreciate the force of the authorities and rulings cited and commented on by defendant's counsel, and their applicability in some instances to the main features of this case. The court, on a review of the evidence and in applying the principles declared

in the dicta and judgments pronounced in the variety of adjudicated cases of this nature and character, have had no little difficulty and hesitancy in deciding that the verdict herein should remain undisturbed. The grounds urged for a non-suit or new trial and specifically set out in the rule are the ordinary defences emanating from or out of the relative positions of servant and master, and may be briefly described as a traverse of any negligence on defendant's part of the *common employment*, and that the servant had contracted to take upon himself the known risks attending upon the engagement, the absence of evidence shewing defendants interfered with the work, or that they were guilty of negligence in hiring the servant, who, as alleged, directly caused the accident. Although the trials of such cases are not of frequent occurrence in our courts, the rules of law and the principles governing them are well recognized. In *Add'n on Torts*, p. 399, the principle is generally stated to be, "That where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to *unreasonable risks*, and has been guilty of *no want of care* in the *selection of competent servants*." And on the subject of common employment we find it laid down, "That a servant undertakes as between him and the master to run *all ordinary risks* of the service, including the *negligence* of a fellow-servant; *Wiggett vs. Fox*, 11 Ex. 832." "As between master and servants the duty of the master is to take care that the servants whom he hires shall be of *competent skill* and *ordinary carefulness*; when he has done that he has done his duty between them;" 31 L. J. C. P., p. 30. The jury has found, upon application of these rules or principles to the evidence, that plaintiff did not undertake on entering defendant's service to run a risk of the character of that resulting in the loss he suffered and which was therefore an *extraordinary risk*, arising months after he entered on his duties. It appears from the evidence that Ruthven's first appearance on the scow was during the forenoon of the day on which the misfortune occurred, and as a "green" or inexperienced hand he was placed at the engine by the chief engineer to be instructed or *broken in*. His wages were more than these paid to the plaintiff and his co-laborers; their respective employments or duties were different, and it is shewn that Ruthven was defendant's hired servant; that he was not skilled or sufficiently competent to perform the

work which he was engaged in when the accident occurred, as in the words of Hatcher, defendant's own witness, "He (Ruthven) was put there to learn the way to drive piles;" and there appears to be a concurrence of testimony that it would require a skilled, capable and experienced person to drive or attend the engine. Upon this and other testimony the jury concluded there was negligence and a want of care in the selection in this instance of a competent servant, and that the defendants had not taken due care not to expose their servants to unreasonable risk.

As to the contention that there was no proof of any personal negligence, or of any interference of defendants with the work at the time of the accident, it did appear in evidence that defendants, or two of them, personally superintended the general operations or labors of those engaged in their works, and their engineers and superintendents attended to the discharge, in detail, of certain duties allotted to them, and reported thereon to defendants. Two of these, Carmody and Palmer, appear to have been in charge of this particular part of the work, and Ruthven, another servant, was running the engine, when, thro' his "unskilfulness and incompetence," as sworn to, the accident to plaintiff occurred. From these facts and the finding of the jury thereon, and applying thereto the principle of law embodied in the following dictum, it appears to us the defendant's contention in this particular must fail. In the case of *Redie vs. L. N. W. R. Comp'y, 4 Exc. 244*, Rolfe B. observed: "The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*; the party employing has the selection of the party employed, and it is reasonable that he who has made the choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or care of the person employed, &c."

Defendant's counsel strongly contended there should be affirmative evidence on the part of the plaintiff placing the charge beyond a reasonable doubt, before the case could be sent to a jury.

The court is with Mr. Kent in contending that the onus of proof lies on the plaintiff, and in *Cotton vs Wood, 8 Conn B. R., p. 570*, the ruling on that point in such cases is clearly laid down, "That the plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of defendant or his servant; and there can be no such proof unless it be shown

that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty." Now, from the evidence it appeared that plaintiff was defendant's hired servant, and was engaged at laborer's work on the scow; that Ruthven was engaged on the engine in hoisting mud, and was running the engine for the first time on that day, and when the accident occurred he was told by Carmody "that he (Ruthven) had taken the man's leg off," &c. It was also given in evidence that a person could turn the wheel (to throw the engine off the centre) with perfect safety if they were a competent man running the engine, &c., &c. The court considers there was sufficient affirmative proof for the jury of the existence of a duty on the part of the defendants towards the plaintiff and others, and of a breach of that duty, and that the substance of the issues was substantially supported by the evidence; *see Tarrant vs. Webb*, 18 C. B. 797; *Ormand vs. Holland*, E. B. & G. 102. The want of care in the selection of competent servants would be an instance of negligence—*Best vs. Smith*, v. 1, p. 437. As to the alleged contributory negligence of plaintiff, it was shown by his own evidence and that of Steer, and also of Hatcher, the defendant's witness, that plaintiff was perfectly sober during the whole of that day, and that although his position was that of a laborer engaged in assisting to move the scow, &c., &c., &c., as ordered by Palmer, still, in obedience to the orders and directions of Carmody, whilst the latter and others were running the engine, plaintiff frequently, or as he stated, over one hundred times, threw the engine off the centre, and on this occasion did so by the direct order of Carmody in the same manner as on previous occasions, and did not regard (excepting as referred to in evidence) the work as dangerous.

Counsel for defendants also contended that plaintiff was well aware of the danger and risk arising from the work when a "green" or inexperienced hand would be so engaged at the engine; but we must recognise in such reasoning an admission of the extraordinary and unusual character of the risk the plaintiff and his fellow-laborers were thus subjected to. We have the testimony of plaintiff as to the only risks or dangers likely to happen, and some of which did happen, whilst the engine was being managed by others than Carmody, and such a risk as this is not referred to nor was any such apparently anticipated. Reference may very appropriately be made here to the case of *Weblin vs. Ballard*, W. R., 2 B. D., 10th April, 1886,

where this defence of contributory negligence was relied upon, and where the decision of the judge was declared on the common law rights and duties of the parties. The action was brought under the *Employer's Liability Act, 1880*, by the widow of a workman killed while in the defendant's employ by falling off a ladder used by him in connection with certain machinery of defendants. It was contended (*inter alia*) that this defence of contributory negligence is still left to the employer. It appeared "that the use of the ladder had been so manifestly dangerous that everyone who saw the ladder so used must have been aware of the danger." This, it was argued by the defendant, proved that the deceased had been guilty of contributory negligence—*A. L. Smith, J.* "I do not agree; the mere fact that the deceased knew that the work was manifestly dangerous of itself does not constitute contributory negligence." If it had been shown that he had used that which was dangerous in a negligent manner, that would have been contributory negligence—see *Homes vs. Clarke, 9 L. T. N. S., 178*

It does, therefore, appear that from plaintiff's knowledge of his surroundings in the discharge of his duties and his repeated successful performances of the same act or work of "throwing the engine off the centre" in obedience to orders, and from all the facts, and the application of the law to the facts, there is nothing to justify the court in holding that the jury was in error in relieving the plaintiff from the charge of having contributed by his misconduct or negligence to the accident by which he suffered the loss of his leg.

The exception taken on the ground of the improper admission of evidence was regarded by counsel as unimportant, and consequently they did not urge it in the course of their argument.

In reference to the last ground taken by defendants for a new trial, that is, because of the alleged excessive damages awarded by the jury, the court do not consider themselves justified in interfering with the finding of the jury under the circumstances; and, aside from the fact of the court having already decided in favor of the plaintiff on the important grounds or points of the rule, it might be observed that it is a well-established rule that "the case must be very gross and the damages enormous for courts to interfere; 3 *Wm.*, 61, *Sharp vs. Brice, Wm. Bl.*, *Rep. 2, p. 942*, and 4 *T. R. 656, Duberly vs. Gunning.*" "Where the damages depend upon the mere sentiment and opinion the court have no line to go by." We have no right in such a case to set up our opinion against

that of a jury to which the law has referred the decision of the question of damages. This appears to be the ruling in all such cases of personal tort.

The case at the instance of the defendants was tried before a special jury, and received that attention and impartial consideration such a tribunal is wont to render in the discharge of its duties. The jury very properly and intelligently disposed of the claim made against the defendants under the first count of the declaration, and by their verdict relieved the defendants from liability for injuries resulting to plaintiff from the negligence of his fellow-servant.

The court consequently has had no occasion to make any observation in dealing with this rule on the position and rights of the parties involved under that count, and its attention has been confined solely to the exceptions taken to the finding on the second count. This finding cannot be disturbed as in the mind of the court the weight of testimony and the law justified the jury in arriving at the verdict recorded, and therefore, this rule must be discharged with costs.

HON. MR. JUSTICE PINSENT:

This case was tried before Mr. Justice Little and a special jury in the last regular term of this court.

The jury found a verdict for the plaintiff with \$1000 damages.

The defendant obtained a *rule nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside as being contrary to evidence excessive in amount, and upon the main ground that the injury arose from the act of a fellow-servant in the course of his common employment with the plaintiff and without culpability on the part of their employer, the defendant

This rule came on for argument in the late post terminal sittings. My learned brother before whom this case was tried has in his judgment so largely quoted from the evidence given at the trial, and has so industriously and elaborately referred to adjudicated cases bearing upon the principles involved in this controversy, that I need not do more than refer in a general way to the facts and to the principles of law which are to be applied to them.

The plaintiff's counsel in support of the verdict contends that while it is true the injury arose from the act of a fellow-servant which would not under ordinary circumstances give a right of

action against the common employer, yet that in this case the fault lay with the master in employing unskillful labor where skillful labor was necessary, and subjecting the plaintiff to an extraordinary risk, for the consequences of which the employer would be responsible.

It appears that on the occasion upon which the accident to the plaintiff occurred, one Ruthven was employed to attend the engine and to shut off the steam; and the plaintiff's case is that by Ruthven's not shutting off the steam in time, the plaintiff's leg was broken by the fly-wheel, and he attributes this neglect to the fact that Ruthven was a green hand employed that day for the first time at this work; that he was for the first time being taught by Carmody the defendant's engineer, a skilful man, who used to "break in" or teach laboring men such work, and the plaintiff's position is that it was the duty of the defendant to have employed skilled or well-instructed labor, and not for considerations of economy to have subjected his servants to the risk of such employment as that described.

It was contended with much force and ingenuity by defendant's counsel that the practice of employing fresh hands and having them broken in by Carmody, had prevailed for months; that the practice was known to the plaintiff, and that he had voluntarily held his employment subject to that system; moreover, the plaintiff was a volunteer in this duty, which did not belong to his department on board the scow, and that by his improper intervention the accident occurred to him; that it was the duty of one Hatcher "to throw the engine off," to whom Carmody had given the order to do so. It was also contended that the practice of employing incompetent men was unknown to defendant and contrary to his orders.

The plaintiff, on the other hand, says a man never before instructed ought not to have been employed to shut off the steam when the scow was at work; that he was no party to the system of employing green hands; that he was not a volunteer improperly intervening, but that he attended to a duty which he and others on board the scow were in the habit of doing, and of being ordered to do in the course of their employment; that the order given by Carmody to "throw the engine off," was not addressed to any man in particular but was a general direction; that whatever orders had been given by defendant as to the non-employment of incompetent men, had not been made known nor conveyed to the plaintiff; and that in any case,

defendant was responsible for the act of Carmody, his agent, in putting such men to work.

The law very properly holds that a master or employer is not under ordinary circumstances liable to his employé for an injury suffered by the latter, from the act of his fellow-servant in the course of their common employment; but it also holds, with equal propriety, that where either by his personal negligence or through his retaining servants to perform work for which they are incompetent and unqualified an accident occur, he is responsible to his employé for the consequences.

The servant must take the ordinary risks of his employment, and one of these is the negligence of fellow-servants, where the master has not been negligent in selecting or retaining them, but where either personally or through his agents, persons are employed known to be unfit for the business to which they are assigned, the master will be liable.

The jury have found for the plaintiff, upon the evidence touching the issues thus raised, and applying these principles of law to the case, there seems to have been abundant evidence to go to the jury in support of the plaintiff's claim, and there is nothing to warrant the court in saying that their finding upon the whole evidence, was so erroneous or perverse in principle, or so extravagant in amount, that we should undertake to interfere with their conclusions as judges of facts, and of the amount of damages which, under the circumstances, should be awarded to a plaintiff.

Mr. I. R. McNeily and Mr. E. P. Morris, for plaintiff.

Mr. Kent, Q. C., for defendants.

1886, *July*. PINSENT, J. ; LITTLE, J.

Practice—Pleadings—Deceit—Misrepresentation—Declaration—Demurrer.

In an action of deceit to recover the amount paid towards the formation of a company on the representation that the company was to be managed in Saint John's, whereas it was to be managed in Liverpool. The declaration was demurred to on the grounds, that it failed to show that the party had taken the shares through the particular representation, or that he had lost anything by having the shares, or by mismanagement in Liverpool, and that the alleged misrepresentation was an innocent one.

Held—Facts which are the materiality of the inducement must appear on the pleadings. In actions of deceit the essentials *i. e.* the facts constituting, falsity of representation, knowledge of the person making it, assertions known to be unfounded—representations acted upon—damage resulting—must appear on the declaration.

IN this action the plaintiff seeks to recover from the defendant £2000 stg., which it is alleged the plaintiff paid to the defendant under the false representation that a proposed steamship company, which was to acquire and run steamers between New York, Halifax and St John's, should be managed in Saint John's, whereas it *was* to be managed in Liverpool.

The case belongs to the class known as actions of deceit, and the essentials for the sustainment of such an action are, falsity in the representations made, knowledge of the falsity upon the part of the persons making the representations, or an assertion of positive knowledge shown to be unfounded, or that the facts misrepresented are peculiarly within the means of knowledge of the person held responsible for the incorrect assertions, that the plaintiff had himself no knowledge of the actual truth before the cause of damage arose, that the representations were not made as mere matter of opinion; that the misrepresentations were acted upon by the plaintiff, and finally damage must be shown to have resulted to him as the consequence of the misrepresentations.

The parties will understand that in the present proceedings we know nothing of the facts or events of the case, or how they might prevail in another form, and that all we have to decide is whether upon the face of the first count of the plaintiff's declaration or statement of his claim, a sufficient case is set out to satisfy the requirements of the law, before it could be sent to trial before a jury.

The claim is set out in the plaintiff's declaration in the following words :

"For that the defendant was engaged in endeavoring to obtain shareholders in a certain company, then about to be formed for the purpose of acquiring certain steamers and running them between New York, Halifax and St. John's; and, thereupon the defendant, with the intent to induce the plaintiff to become a shareholder in the said proposed company, represented to plaintiff that the affairs of the said proposed company and said steamers would be managed and would be under the control of such persons as should take shares therein, who should reside or be represented at St. John's aforesaid, or of a committee or directorate of such persons; whereas the said proposed company was not to be managed by and to be under the control of such of the said persons residing or represented at St. John's, or by a committee or directorate of such persons, but was to be managed by and under the control of certain persons residing at Liverpool, in England, as the defendant then well knew; and the defendant by the said representation induced the plaintiff to pay to the defendant the sum of two thousand pounds, stg., equal to nine thousand six hundred dollars, which the plaintiff then paid to the defendant, whereby the plaintiff lost the said sum of nine thousand six hundred dollars, and the interest that he would otherwise have made thereon."

This declaration, besides its vagueness in alleging the position or assumption of position, in which the defendant stood in relation to the intended company, wholly fails to show that the plaintiff was induced to take shares through these particular representations, and that he may not otherwise have taken them, or that he ever took or held any such shares, or lost anything by having shares in the projected company, or by mismanagement of the company's affairs in Liverpool, or if he did, in what way the fact of the affairs of the company being managed and controlled in Liverpool caused the plaintiff any damage or injury that would not have arisen from management under a directorate resident in St. John's, and that there was such a material difference in the adventure as must have been present to the defendant's mind, and in his contemplation at the time of the misrepresentation.

If anything forming the groundwork of an action is to be discovered from this count of the declaration, it is that the defendant has received so much money from the plaintiff upon a false pretence, and that for some not sufficiently defined reason the defendant is under a personal obligation to pay back that money with interest, which could not well be except for entire failure of consideration, and if this be so, the common count for money had and received would seem to be sufficient.

A reference to such authorities as *Bedford v. Bagshaw*, 29 L.J., *Exch.* 58; *Pontifer v. Bignold*, 3, *M & G* 63; *Kennedy v. Panama Company*, L. R. 2, Q. B., 580, will illustrate the essentials

of a claim such as that intended to be here set out, and of the manner in which it should be charged in an action.

The plaintiff's declaration is insufficient in law and there must be judgment accordingly, with leave to amend.

HON. MR. JUSTICE LITTLE:

The grounds of the defendant's demurrer were "that the alleged misrepresentation was an innocent misrepresentation which did not affect the substance of the shares applied for, or the substantial position of plaintiff as a shareholder in the company."

From this record, so far, it is quite apparent there is an absence of the ingredients necessary to support the action for deceit for which the proceedings are instituted, the pleadings should fully and substantially set out with certainty the grounds on which plaintiff rests his claim for damages consequent on the alleged fraudulent representation. Such statement of his claim must not be ambiguous or obscure, but certain to a common intent—*Step on Pleg.*, p. 312. The materiality of the statement on which a party was induced to enter into a contract must be made to appear on the pleadings, and this can only be done by a statement of facts and circumstances shewing that the party acted on the inducement or statement so made, and the results the outcome of such action.—*Hughes vs. Twissdan*, W.R.V., 34, p. 500.

The plaintiff does not aver that by the deceit or misrepresentation charged against defendant he was induced to take shares, and did then invest in the stock of the proposed company, nor is it shown or alleged positively that the defendant made the representation knowing it to be untrue for the purpose of deceiving the plaintiff. For if it were made *bona fide* the defendant believing in its truth, the plaintiff might not be able to maintain his action.—*Pasley v. Freeman*, 3, D. & E. R., p. 52-20, L. R. C. D., 45; *Taylor v. Ashton*, 11 M. & W., 401, 12 L. J., Ex. 363.

It must appear with certainty that the representation was made for a fraudulent purpose with the intent to induce the plaintiff to do an act which he afterwards does to his own prejudice. This is not shown by this declaration, for the plaintiff merely sets out that by the representation so alleged to have been made, he was induced to pay the defendant \$9,600, and thereby lost the same, and does not proceed to state it was in-

vested in shares of the company, and that the committee of management resided at Liverpool, and there superintended the affairs of the company, instead of at St. John's, and by their conduct and management, under such circumstances, damage and loss resulted to the plaintiff as a shareholder. There is also an absence of any averment of the character in which defendant acted, whether as promoter of the company or that he was in any manner interested in its organization or subsequent operations.

It is true there is in the declaration a common count for money had and received, but it is questionable whether the plaintiff could derive any benefit or advantage under it, in view of the nature of this claim and character of the action now instituted.

The court, in support of the demurrer, would give plaintiff leave to amend this count of his declaration, and that it may be so formulated as to cover the whole ground and set out the facts in such form as to present that issue and right of action which the plaintiff contends he has at law for the alleged deceit and fraudulent representation charged against defendant.

Sir W. V. Whiteway, Q. C., for defendant.

The Attorney General and Mr. Morison, for plaintiff.

NFLD. RAILWAY CO. AND EVANS AND 147
ADAMSON v. THE GOVERNMENT OF NFLD.*

1887, *January*. HON. MR. JUSTICE PINSENT, D.C.L.

Contract—Apportionment—Counter-claim for unliquidated damages—Set-off against assignees of contract.

By contract embodied in a statute A. D. 1881, the Newfoundland Railway Co. covenanted to complete a Railway in five years and thereafter maintain and continuously operate the same. In consideration thereof the Government of Newfoundland covenanted (a) to pay upon construction and continuous operation, an annual subsidy for thirty-five years "to attach in proportionate parts and form part of assets of Company as and when each five mile section complete and operated." (b) To grant to Company in fee-simple 5,000 acres of land for each one mile of Railway completed, on completion of section of five miles. The Company completed a portion of line, and received from the Government half-yearly payments proportionate part of subsidy which was deemed to attach thereto, and the specific grants of land. Thereafter the contract was broken by the Company and the Government refused further payments. In a suit by the Company, and its assignees.

Held—(1) On completion of each section, proportionate part of subsidy became payable for specified term, subject to operation. (2) Claim to grant of land was complete when section which carried it was complete. (3) No right of counter-claim for damages against Trustees of Bond-holders for failure of Company to complete line.

THE Government of Newfoundland in the year 1880 having adopted what was termed a "railway policy," caused to be passed by the Legislature an Act for the construction of a railway, and by that enactment provided for the raising of a loan of five million dollars by the issue of colonial debentures, and for the appointment of commissioners to carry out the objects of the Act.

In 1881 the Legislature passed another Act, repealing that of 1880, entitled "An Act respecting the Newfoundland Railway," which, after referring to the passing of the measure of the previous year, recited as follows:—

"And whereas, by resolution of the Hon. the Legislative Council and House of Assembly, passed in the 44th year of Her Majesty's reign, it was resolved that it was more desirable, if a suitable proposal be obtained, that

* The decision in this case was appealed to the Privy Council by the Newfoundland Government, and the findings of Mr. Justice Pinsent, Nos. (1) and (2), upheld. The Privy Council overruled No. (3), holding in addition that the Government of Newfoundland were entitled to set off a counter-claim for unliquidated damages for the Company's breach of contract, in not completing the line; and that this set off, availed against the assignees of the company; the claim and counter-claim, having their origin in the same portion of the same contract; the obligations which gave rise to them being closely intertwined.

For the Judgment of the Privy Council on appeal *vide* Appendix, p. 1.

the Government should contract with a company for the constructing, maintaining, and operating the said railway by the company, in consideration of the payment to the company of an annual subsidy and the concessions of land, with other privileges, in substitution of the provisions of the said Act."

The preamble further recited that a proposal had been made presenting a favorable basis for a contract, and that it had been resolved to appoint a joint select committee to negotiate a contract, and that such a committee had been appointed and had entered into a contract subject to ratification by the Legislature.

The Act in its first section sets out that contract, and declares it to be ratified and confirmed.

The contract contains stipulations on behalf of the company to construct, maintain, and continuously operate 340 miles of railway, commencing at St. John's, and (as set out in the plaintiff's petition).

"The said contract provided, amongst other things, as follows:

(13.) The said railway and branch lines shall be completed and in operation within five years from the date of this contract. In consideration of the premises and of the due and faithful performance by the said Syndicate Company of all and singular the covenants and agreements herein contained on their parts to be performed, the Government of Newfoundland covenants and agrees

(14.) To pay the Syndicate Company, upon the construction and continuous efficient operation of the line, a subsidy of one hundred and eighty thousand dollars per annum, in half-yearly payments, in gold, in London, England, on the first day of January and on the first day of July in each year, for a period of thirty-five years, such annual subsidy to attach in proportionate parts and form part of the assets of the said company, as and when each five-mile section is completed and operated, or fraction thereof, at terminus at Hall's Bay,

(15.) The Government to grant in fee-simple to Syndicate Company five thousand acres of land for each one mile of railway completed throughout the entire length of 340 miles: The said fee-simple grant of five thousand acres of land per mile to be made to the said Syndicate upon completion of each section of five miles of railway or fraction at terminus at Hall's Bay."

Following in the Act the confirmation of the contract, comes the "Charter of Incorporation," which amongst other things provides, that—

"This corporation shall have the right to borrow money and issue notes or bonds upon the faith of the corporate property, and also, to execute a mortgage or mortgages as further security for repayment of money thus borrowed."

The company proceeded to construct the railroad, and having under the borrowing powers conferred by charter raised in Eng-

land a sum of £400,000, on first mortgage bonds, the company better to secure their payment with interest, assigned to the plaintiffs, Evans and Adamson, one hundred miles of the railroad, being its southern division and its branches, with its privileges and franchises, "including the grant by the Colonial Government of Newfoundland in fee-simple of 5,000 acres of land, for each mile of railway forming part of the said division or branches, or any of them, and also, all the right, title, interest, claim or demand whatsoever, which the said company then had, or might at any time thereafter acquire or become in any way entitled to in respect of the said division and branches, or any part or parts thereof, in and to the said subsidy of \$180,000 per annum, payable by the Government of Newfoundland in accordance with the provisions of the said Act," in trust for the persons holding the bonds.

The interest due upon these bonds has fallen into arrear.

The Government of Newfoundland has not, since the first day of January last, paid to the company or to the bond-holders any subsidy.

It is admitted that grants in fee-simple of lands along the line of railway so far as it has been constructed, have been issued to the company by the Government.

It is admitted that up to the first of January, 1886, the Government had paid a subsidy calculated upon seventeen five-mile sections of the road.

The plaintiff company is now in the hands of a receiver and manager, under orders of the high court of justice in England, and of this court.

In August last the plaintiffs filed their petition in this suit.

The litigants having arrived at certain pleadings involving questions of law and fact, have submitted a case to this court for preliminary adjudication, and for the purpose, in certain events, of avoiding further litigation.

The main question resolves itself into this: are the plaintiffs, Evans and Adamson, the trustees by way of mortgage for the bond-holders, entitled to the benefit of a semi-annual subsidy upon seventeen five-mile sections of the railroad, estimated at \$22,500; for the purpose of this particular adjudication it is assumed that, for that distance, the railway has been and is efficiently operated according to the contract.

At the argument it was contended, on the part of the plaintiffs, that the completion of the whole line was not, even as between the contracting parties, a condition precedent to recovery of the subsidy for so much of the line as had been completed, and that whatever right of set-off, or counter-claim for damages

might exist as between the Government and the company, that the payment was not subject to any such drawback as against persons from whom, by the express provisions of the contract and charter, the company had been empowered to raise money for the construction of the line. That if there was any ambiguity in the language, the exposition given to it, in fact and practice, by the defendants from the very outset of the work down to January last, removed any doubt about the intention of the parties.

For the defendant Government it was contended that the stipulations of the contract were dependent, and not independent, and that the covenant for payment of the subsidy was not to take effect until completion and operation of the whole line; that the subsidy was not divisible, and that the fact of a late ministry having paid it proportionately with the work done and accepted, was the result of error, or possibly of collusion, and could not be allowed to affect the interpretation of the contract; that the words "attach in proportionate parts and form part of the assets of the company," signified simply that the amounts were to accumulate in the hands of the Government to the credit of the company until the whole was payable, and were to be wholly lost to the latter upon failure to complete the entire line within five years.

There is no question, as we have had occasion to remark in other actions arising out of this Act, that both the contract and the charter are so inartificially framed as to give rise to difficulties which with greater care and skill might have been avoided.

While, in this particular case, conscious of the variety of interpretation to which those parts of the constating instruments now in question may be open, I find little difficulty in arriving at what I conceive to be the meaning of the contract and the original intentions of the contracting parties.

It must in the first place be borne in mind that the formation of the Newfoundland Railway Company was not an ordinary case of a company started by promoters seeking a charter for themselves.

The promoters were the government of the colony, seeking for contractors who would supply or secure the necessary funds, "aided," to the extent of a subsidy, by the funds and credit of the colony.

The incorporating statute is entitled "*An Act respecting the*

Newfoundland Railway," and the scope and tenor of the Act shew that the construction of the railway was an undertaking on behalf of the public through the agency of the government and of the company, a fact which, to my mind, aids us in determining the meaning and effect of the phraseology employed to qualify the general engagement on the part of the government to pay a subsidy of \$180,000 per annum "upon the construction and continuous efficient operation of the line."

The qualifying terms are thus expressed:—

"Such annual subsidy to attach in proportionate parts and form part of the assets of the said company, as and when each five-mile section is completed and operated."

These peculiar words were certainly not introduced for nothing, are not mere surplusage, and were intended to carry with them some serious and important consequences.

I can gather from them no other meaning than that upon the approved construction of every five-mile section a proportionate part of the subsidy should accrue to and vest in the company, should follow that extent of property, and should inhere and continue so long, at least, as the terms attending the operation of that part of the line are fulfilled.

Much attention was given at the bar to the meaning of "attach," little or none to the equally important expression "form part of the assets."

The meaning of the term "assets" is the entire property of all sorts belonging to a merchant, to the estate of a deceased person, or of a bankrupt, or of a trading or other company, applicable in the first place to the payment of debts and liabilities, and subject to be charged therewith by the proprietors.

It appears to me then, that it would be difficult to use language at once more concise and more conclusive, to vest in the company the proportionate subsidies, as property available for securing and discharging the debts of the company.

These proportions of subsidy having thus been declared by the terms of the contract to be *assets*, it has to be borne in mind that the 10th section of that part of the Act termed the charter of incorporation, confers borrowing powers to raise money upon the faith of the corporate property and to execute mortgages as security.

But it is contended on behalf of the Government that, if the sectional subsidies did vest as assets and have been rightly paid during the construction of the line, that when the breach oc-

curred by failure to build the entire road within five years, time being of the essence of the contract, the liability to pay for anything ceased; that the obligation to pay the subsidy is indivisible and not capable of being apportioned.

I cannot go with that contention. It seems to me to be inconsistent, not only with the spirit of the Act and the powers conferred by it, but with the very words "form part of the *assets* of the said company *as and when* each five-mile section is completed."

The several portions of the subsidy not only become assets or property of the company, but they become so *instantly* with the completion of the section.

It seems to me that the words of the contract and charter taken together are equivalent to the investiture of the company, with borrowing powers upon the credit and security of all accruing proportions of the subsidy.

The mortgage bondholders seek in this suit no greater contribution from the Government of Newfoundland towards payment of their interest than the subsidy calculated upon the completed and working length of line.

Moreover, two or three positions have been overlooked in dealing with this point of the case; for example, the covenant of the Government is to pay the subsidy of \$180,000 for a period of thirty-five years; but upon looking more closely into the contract under the "pre-emption clause" it is seen that the period of thirty-five years is to be reckoned from the date of the contract, which is the 20th of April, 1881; and the undertaking of the company to complete the line is within five years from the date of the contract.

It could hardly be contended that the Government would be liable to pay the full subsidy of \$180,000 for the entire period of thirty-five years, including the five years or other period in which the line might be in course of construction; and it seems to me to be thus clear that divisibility and apportionment were intended by the contracting parties to commence with the first completed five-mile section.

Again, by the 24th clause of the charter express reference is made to the payment of "cash subsidy or subsidies." Now, "subsidies" could have no existence if the defendant's contention prevailed that there was one indivisible and unapportionable subsidy.

Reference might also be made to the clause which provides,

as security for the performance of the contract, a deposit in the nature of damages of \$100,000; and also to the fact that, while the charter is silent as to any avoidance of the contract by reason of its non-completion within the period named, it does expressly provide for it in the event of the work not being *commenced* within three months after the passing of the Act.

If those parts of the constating instruments relating to the subsidy were ambiguous or obscure, it is a well-established principle that recourse may be had to the context for their elucidation, and in that view we find, on reference to clause fifteen of the contract, immediately succeeding that providing for the subsidy, that fee-simple grants of five thousand acres of land for each mile of railway are to be made 'upon completion of each section of five miles of railway;' and by the seventeenth section it is provided that:

"Upon the completion of each five-mile section of railway, as herein-before mentioned, the syndicate company shall within two years thereafter select the alternate blocks on each side of the railway to which they will be then entitled."

It is also provided that where such blocks cannot be obtained along the constructed line, the company may select Crown lands elsewhere to make up the deficiencies; but the selection for the purpose of supplying these deficiencies shall be made within three years of the completion of the railway.

It is not even contended that these grants along the constructed line can be withheld, and as a matter of admitted fact they have been nearly all made.

The conclusion appears to me to be irresistible that the same thing was intended by the language used in connection with the subsidy, that is thus so absolutely and unmistakeably expressed with regard to the sectional grants of land that the company became indefeasibly entitled to them in proportionate parts upon the completion of every five-mile section.

Again, the language which is the subject of controversy here is in the nature of a proviso or saving clause, with regard to which the rule of construction is, that where there are a general and a particular enactment, the particular enactment must be operative and the general enactment must be taken not to affect those parts subject to the special provisions of the Act.

I gather then *ex visceribus actūs* that a separate liability has been established for payment by the Government of Newfoundland of subsidies upon the five-mile sections completed, with a

right of property in them available and subject to be disposed of by the company as a security to mortgage bondholders.

If anything further were necessary to demonstrate the intention of the statute it is to be found in the almost simultaneous exposition afforded by the dealings of the Government with the company and the railway: the until now undisputed right of the company to the sectional subsidies as they accrued and to the land grants.

The fact, as is admitted, that the railway has been and now is used for the conveyance of mails under contract with the company is significant, as by the 12th clause of the contract provision is made for this service; and again, in the Act of the Legislature of this present year, as in former years, "for the granting supplies to Her Majesty," provision is made for the railway subsidy.

Whatever right of counter-claim, in the nature of damages for non-completion of the entire line within five years, might have been set up as between the contracting parties only, I am of opinion that it is untenable as against the trustees for the bondholders, while at the same time, if the Government desires the completion of the line, I know of nothing which relieves the plaintiff company of the obligation to construct it.

In my opinion judgment upon the questions in the case stated must go for the plaintiffs.

In arriving at this conclusion I have the satisfaction of feeling that the effect of this judgment, if upheld, will be to sustain the good name and credit of the colony, in saving it from the reputation of having acquired nearly a hundred miles of railway at the expense of capitalists abroad without paying the subsidy, upon which, rightly or wrongly, they depended as some security for interest.

I have also the satisfaction of knowing that, if the judgment of the court be erroneous, there is an Imperial tribunal to which any party supposing himself to be aggrieved may, in cases of importance, appeal for its correction; and if this one be reversed, it will be made apparent that the bondholders have, in advancing their money to the company, mistakenly relied upon a security in which the credit of this colony was not legally involved.

Mr. Kent, Q. C., for the plaintiffs.

The Attorney General (Winter), Mr. McNeily, Q. C., and *Mr. Emerson*, for the defendant.

1887, February. PINSENT, J.; LITTLE, J.

Pleadings—Petition under 46 Vic., cap. 16.—Demurrer to—Crown grant—Setting aside of.

Under 46 Vic., cap. 16, (local Act), "to facilitate trial of questions relating to Crown grants," a petition was filed praying that a certain grant made by the Crown might be set aside as void or that it be amended. Petitioner had purchased property, a portion of which it was alleged was covered by Crown grant. The grantee appeared to have had a title against the Crown before the grant was issued, and the grant so issued was superfluous and *ex gratia*. Petition was demurred to on the grounds of insufficiency in law, in that the averments did not establish a case contemplated by 46 Vic., cap. 16.

Held—That 46 Vic. was designed to supply the English remedy by *scire facias*, but that petitioner had failed to establish a case in which a *fiat* would *ex debito* have gone for a *scire facias*. An action of trespass or ejectment would fitly meet the case. The act was intended to meet cases where grants were obtained by fraud, concealment or mistake, or issued to the detriment of the rightful grantee, or where an applicant with the better right has been deferred in favor of another. No irregularity had been shown in the issue of the grant to call for the avoidance or correction of same.

THE plaintiff by his petition sets out that he purchased from Ellen Hooper, formerly of Burin, certain land and premises there situate.

That petitioner is kept out of possession of part of that land by the defendant, claiming by virtue of a Crown grant, of date A. D 1877.

That defendant obtained that grant upon a petition to the Government for a grant of a parcel of land described by metes and bounds, a large part of which covers the land purchased as aforesaid by the plaintiff; that the petition of the defendant in applying to the Crown for a grant of the land alleged that there was to her knowledge no claim upon the land other than that of the defendant, who asserted a derivative title of possession of over sixty years.

The plaintiff prays the intervention of this court to set aside that grant and to declare it void, or cause it to be amended, so as to enable plaintiff to take possession of his land acquired from Ellen Hooper.

The defendant demurs to the plaintiff's petition for insufficiency in law.

The matter came on for argument in the late term of this court before Mr. Justice Little and myself; the attorney general, (Mr. Winter), supporting the demurrer, and Mr. R. McNeily, for the plaintiff, supporting the petition.

The proceeding is one which the plaintiff claims to have the right to adopt by virtue of the provisions of the Act 46 Vic., cap. 15, "An Act to facilitate the trial of questions relating to crown grants, licenses and leases, and for other purposes."

This is the first instance in which litigious use has been made of that Act, and the question arises whether the plaintiff by the averments of his petition has brought his case within the object and remedy contemplated by that enactment.

The Act is one designed to provide a mode of proceeding and a remedy in case of abuses such as those, for the redress of which in England the ancient proceeding by writ of *scire facias* would have been applicable, probably, indeed, to supply means of redress of even a more widely remedial character than proceedings by *scire facias*, means adapted to the local legislation relating to crown lands.

While the proceedings by *scire facias* are inapplicable for the avoidance or correction of grants of crown lands in the colonies mainly because such grants are not enrolled in chancery, it is necessary for a due comprehension of the application of the Act 46 Vic., cap. 15, to consider what are the nature and effect of the proceeding by *scire facias*.

In *Brewster vs. Wald*, 6 *Modern Reports* 229, A. D. 1704, it was held—

"That if letters patent be to the prejudice of another, he may have a *scire facias* upon the enrolment thereof in chancery to have them repealed as well as the Queen may ; as if a fair be granted to the damage of mine, I may have a *scire facias* to repeal such grant."

As is said by *Baron Parke* in the *Eastern Archipelago Co. vs. The Queen*,—

"Every subject injured by the violation of a charter is entitled to a remedy by *scire facias* at common law, for *scire facias* is to be allowed *ex debito justitiæ*. This is expressly laid down in *Sir Oliver Butler's case*, (2 *Vent.* 344), and *Reg. vs. Aires*, (10 *Mod.* 354), the meaning of that is, that he is entitled to it, if justice requires it, not as a matter of course, on the one hand or as a matter of favor on the other."

The case of *Alcock vs Cooke*, (5 *Bing.* 340), was an action of trover for wreck, and it was there held that a grant may be avoided for concealment in the recital, and is an authority for shewing that a ground of avoidance may be set up in an action at law as against a grantee claiming under the void grant.

It appears to me that the plaintiff's petition wholly fails to establish a case in which a *fiat* would *ex debito* have gone for a *scire facias*.

If the plaintiff purchased from one (Mrs. Hooper) who had herself a title good against the Crown in all the land conveyed to the plaintiff, his remedy would be clear either by assumption of possession by him, or by action of ejectment, if the defendant has entered into possession, without resort to proceeding by *scire facias* to set aside an alleged grant, which would be utterly harmless and unavailing as against his title.

If, on the other hand, the plaintiff's vendor had no title sufficient as against the Crown, the grant would, while unimpugned and subsisting, prevail in the defendant's favor; and this petition fails to show that there has been any irregularity or violation of the provisions of the Crown Lands' Acts, such as, being to the plaintiff's prejudice, would give him the right to intervene for the avoidance or correction of the grant.

It must be assumed until the contrary is shown that all things were rightly done in the Crown Lands' department, as preliminary to the issue of the grant to the defendant.

There is this striking peculiarity in the present case that the defendant in seeking for a grant from the Government, alleged a title of over sixty years good against the Crown, and the Government would thus appear to have issued to the plaintiff a superfluous and unnecessary grant *ex gratia*.

This if true, would in no wise aid the plaintiff in his present proceeding remarkable as the gratuitous action of the Government in such cases may be.

I can well understand how contests may arise in which an individual would find a just, convenient, and adequate remedy under the provisions of the 46 Vic., cap. 15, as by way of example, where possession accompanied with meritorious improvements may have conferred a prior right which has been wrongfully superseded by the issue of a grant obtained by fraud, concealment or mistake; again where several grants from the Crown, for the same locality may have been issued to the detriment or embarrassment of the first rightful grantee; or where through error as to forfeiture by a prior grantee or licensee a wrongful grant or license may have been given to another; or where an applicant with the better right has been deprived or deferred in favor of another.

It is contended with no little force, on the part of the plaintiff, that the terms of the Act 46 Vic., cap. 15, are so broad and comprehensive that the case made by the petition of the present plaintiff comes within the Act, as the second section enacts that—

"Any person having or claiming to have an interest in any lands or tenements in this colony, or any rights or privileges arising therefrom or appurtenant thereto, which are or are claimed to be held, conveyed or otherwise affected by any crown grant who shall claim that such crown grant is void or voidable, or has been or ought to be forfeited," and so forth, "or who shall claim any other relief legal or equitable against or in relation to such grant may prefer a petition to the Supreme Court," &c.

The sixth section provides that the Supreme Court and the judges thereof may pronounce such decree and grant such relief, legal or equitable in relation to the subject matter of the petition as might be pronounced or granted "*in, under or by virtue of any other suit, action or other proceeding in relation to any deed, conveyance, contract or document other than a crown grant.*"

I know of no other such "suit, action or proceeding" as would confer upon a third party possessing an unimpeachable title, a *locus standi* to intervene for the purpose of setting aside an invalid and futile conveyance between other persons vendor and purchaser, one of whom may have undertaken to sell and the other to purchase the third party's land. He would be left to the strength of his own title, and to the ordinary remedies with which the law has already invested him for defence from trespass or usurpation.

I think the act contemplates for its uses the cases of opposing claimants from the Crown of the same subject matter where the grant, lease or license impugned, causes such prejudice or damage to another as would give him a right to redress.

It would be giving a most inconvenient and unnecessary expansion to the remedies provided by the Act to hold that it is intended to introduce such modes of litigation as would be simply cumulative with the ordinary common law procedure in actions of trespass or ejectment; and it appears to me that there is not sufficient in the statute comprehensively worded as it is to compel the court to put upon it a construction so foreign to its purpose. In giving effect to the remedy, we must have regard to the evil or the effect intended to be corrected. Judgment must be for the defendant on demurrer.

HON. MR. JUSTICE LITTLE:

It appears from the preamble of the Act under which these proceedings are instituted, that the Legislature recognized the existence of "difficulties and uncertainties" attending the settlement and determination of contentions and disputes touching

the validity or regularity of grants, &c., to Crown lands, and determined on making such provision by this enactment as would "facilitate and render more certain" the trial of such questions.

At this stage of these proceedings, and in face of the course of procedure and practice embodied in and prescribed by the provisions of this Act, I do not consider it necessary or requisite to refer particularly to these "difficulties and uncertainties" which formerly must have attended the prosecution and trial of similar questions and contentions where the rights of the Crown and its grantees or others might be affected under circumstances as these referred to in the argument of this cause, or intended to be presented on the record in this cause.

The common law right of the subject has been established and at all times recognized to prosecute his claim to repeal and cancel letters-patent, royal grants, &c., of all kinds when made against law, or upon untrue suggestions, or when the Crown has been advised to do any act in prejudice to a subject's rights. *Com. Deg.*, 2 *Ven.*, 344.

For the prosecution of this common right the process of *scire facias* was ordinarily resorted to for the repeal of letters-patent, and all grants of the Crown are held to be subject to this incident. *Ch. Perry*, 330, 6 *B. & C.*, 708.

It may be that in practice this process might not have been held applicable to such a procedure in our courts, owing to the absence of any laws making the *enrolment* of such grants in our courts of record obligatory, and therefore such a writ might be inoperative. As it has been adjudged that leases or grants of the Crown not being so enrolled in any court of record, could not be revoked by *scire facias*.—*Reg. v Hughes*, 35 *L. J. P. C. C.*, 23, 1 *L. R.*, *app.* 81, 12 *Jur.*, *N. S.*, 195.

Another process under which the title and rights of the Crown in and over public lands might be asserted and enforced was by an information of intrusion in the nature of an action of trespass. *Q. C. F.*, *Ch. Pregt.*, 382.

By the pleadings in such proceedings as these referred to, the claims of the Crown and those of the subject were particularly and formally set out, and the issue settled or determined by a regular trial at bar. However, further reference to these forms of procedure is not at present requisite or necessary, either for the determination of the points raised by the demurrer or to illustrate the correctness of the opinion of the Legislature as set out in the preamble to the Act. It is suffi-

cient to find that the statute, or the remedy it provides, is merely in aid or in cumulation of existing remedies, as is formally declared by the 8th section of the Act.

The plaintiff, therefore, having here made his election to proceed under the provisions of this Act, the defendant has in no way questioned his right to do so, and the Crown, through the attorney general, (who appeared for the defendant), has taken no exception to the proceedings. It then remains merely to dispose of the question of the sufficiency or otherwise of the matter raised on the demurrer to the petition.

It is clearly the plaintiff's duty to set out in the statement of his grounds for the avoidance of this grant the particular character of the title or claim on which he relies for such purpose. Although the mode of procedure under the Act for the attainment of a most important end is simplified and rendered more facile, still it is incumbent on the parties to adhere in the statement of their claims to an observance of these rules of pleading, requiring parties to be definite and clear in their statements, and to show a legal right to the redress sought for at the hands of the court. In this petition we find the plaintiff satisfies himself in the mere assertion of a claim in the allegation "that he purchased from Ellen Hooper all her right, title and interest in certain land, &c., at Burin," and that this land is now claimed by defendant under and by virtue of a grant to her from the Crown. This, surely, is too indefinite and uncertain to form the basis of any such proceeding as the present. Nor is there in this allegation a statement of facts sufficient to clothe him with the semblance of such a title or claim to justify the interference of the court in the manner prayed for.

The plaintiff has not declared, as he should have in proceedings of this character, what the nature of Hooper's title was, or may be, whether acquired by occupancy or purchase, what length of time plaintiff, or these through whom he claims, occupied this land adversely to defendants; and there is also an absence of all particularity as to notice in relation to the issuing of the grant. I am therefore of opinion plaintiff has failed to show such facts in support of his claim to enable him to avail of the provisions of this Act, and that this demurrer is well taken and should be sustained.

Mr. I. R. McNeily, for plaintiff.

Attorney General, for defendant.

1887, *February*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Partnership—Death of partner—Share of deceased partner, how ascertained—Fiduciary relation—Bill for an account—Parties—Statute limitations.

Under a deed of partnership for general business, it was provided that at the end of each year an account should be made and signed which should be binding on all parties. In the event of death co-partnership to be continued by survivors till end of current year of such decease, and within one year from decease balance due deceased party to be paid to his representative. Last statement signed to be taken by all as value of assets. One of the co-partners died. The administratrix of the deceased partner filed a bill for an account, but the other partners refused fairly to account: (1.) As to the private estate of the deceased partner, which was debited with the purchase money of certain properties which, in the last account signed (in lifetime of deceased), had been placed amongst partnership assets; (2.) That there was a fraudulent disposition of partnership assets to the loss of estate of deceased. It appeared from the books of the partnership that the property in the first item was charged in to the partnership in the hand-writing of deceased, and that the property said to be fraudulently disposed of was sold at public auction for and on account of estate partly purchased by one of the surviving partners.

Held—(Pinsent, J., differing)—That the signed admission, the terms of the co-partnership, and the full knowledge by all the parties of the circumstances, was sufficient to justify the debiting of the partnership account with the purchase money sought to be charged to estate of deceased partner.

Respecting the charge of fraudulent disposition of partnership assets:

Held—(1.) There was no fiduciary relation between surviving partners and representatives of deceased partners—there are legal obligations binding on both. (2.) Statute limitations applies as between any other persons; (3.) The right of a surviving partner to the partnership assets is absolute—that of the representatives of a deceased partner—to an account; (4.) One partner may lawfully purchase the share of a deceased partner; (5.) There was nothing in the conduct of surviving partners or auctioneer to warrant the imputation of fraud or collusion.

THE bill of complaint sets out that the plaintiff is the widow and administratrix of the late Mr James Browning, who entered into co-partnership on the 8th of August, 1884, with the defendants to continue the Biscuit-bakery and general business theretofore carried on by the late Gilbert Browning and said James Browning, under the style of "G. Browning & Son," for the term of ten years from the 1st January, 1884, subject to be determined at certain specified periods by notice from either. The capital stock was to consist of all lands, houses, stores, stock in trade, and premises formerly owned or held by said "G. Browning & Son," the whole being estimated at thirty-two thousand dollars, which was subscribed for by the parties in certain respective amounts.

It was provided that at the end of each year, or so soon thereafter as circumstances should permit, a statement and account of the transactions of the preceding year in the manner prescribed should be made out, and that then, signed by the parties thereto, should be binding on them, and should not be opened or unravelled by any of them after the expiration of one year from the date of such signing; and, in the event of the death of either during the continuance of the co-partnership, the business should be continued by the survivors until the end of the current year of such decease, in all respects as if such death had not taken place, and within one year after the date of such decease, or such further time as might be agreed upon, the balance that should appear to be due to such deceased party at the end of the current year of decease, including his or her share in the profits, should be paid to his or her executors or administrators, together with interest at five per cent. per annum, to be computed from the end of the current year of such decease to the time of payment, the estate of the deceased to be liable for all losses as if he or she had lived between the dates of the death and the end of the current year; and that for the purpose of arriving at the valuation of the share or interest of the deceased, or of his estate in all lands, houses, buildings, or other property (except money) of the co-partnership, the valuation of the same as should appear by the statement or account made up and signed by the said parties thereto, as provided by the indenture at the end of the year next preceding such decease, should be final and binding.

That an account was stated and signed by the parties to the 31st December, 1884, showing a balance due and to the credit of the deceased of \$16,000; that said James Browning died on the 2nd August, 1885, and letters of administration to his estate were granted the plaintiff; that the defendants continued to carry on the business of the firm until the end of the year 1885, and still continue to do so; that plaintiff applied for an account of the co-partnership at the end of the year 1885, but the defendants have refused fairly to account with plaintiff, and particularly as regards two matters or items which I shall presently mention, and the plaintiff prays that defendants be directed to furnish a full and just account of the dealings of the co-partnership, and asks the decree of the court for payment of the amount found to be due the estate of deceased, James Browning

The two items to which I have adverted and about which

the plaintiff chiefly complains are: (1.) That the private estate of James is debited with the purchase money and expenses connected with the purchase by James in 1883, when in sole charge of the business, of lands from the Newfoundland Pioneer Woollen Factory, and land also purchased about the same time from Brien, to the amount of \$5,402.90, which, it is contended, should be charged to the firm; and (2.) That there was an unlawful and fraudulent disposition of 3,109 barrels of flour and 1,900 bags of bread by the defendants, for the alleged losses on which they should be made to account to the plaintiff.

As regards the first item of the land, there seemed to be an impression with the defendants that the deceased acquired this property for his individual account and not for the firm, and this among other reasons has been inferred from a conversation of which Mr. John Browning gave evidence, as having taken place between himself and the deceased shortly after the purchase. From the commencement, in the deceased's own hand writing, the entries for the purchase and incidentals were charged in the books of "G. Browning & Son," as of their property, and whatever may have been the intention originally of Mr. James Browning, it is beyond all question that the trade account, as provided for by the articles of co-partnership as aforesaid, was signed by the defendants, which included those lands under the head of "River Head Plant," as part of the partnership property, and Mr. William Browning states he was aware of this at the time and never made any remonstrance during the lifetime of his brother James.

I consider this signed admission with a full knowledge of the circumstances, besides the terms of the co-partnership articles amply sufficient to debit the firm instead of the private estate of the deceased with the amount heretofore charged to it, and that the account should be accordingly reformed.

As to the second item, respecting the sale of the bread and flour, we heard in argument a great many observations about the fiduciary relations alleged to exist between a surviving partner and the representatives of a deceased partner; and before entering on the particulars of the sale I shall state what I consider to be well settled law on this subject,—the case of *Knox vs. Gye, L. R., 5 H. L., 656*, cited at the bar, decided by that eminent lawyer, *Lord Westbury*, that there is no fiduciary relation between a surviving partner and the representatives of a deceased partner; and in a more recent case, adjudicated by another eminent lawyer, *Lord Justice James*, in *Taylor vs. Taylor*,

28 *Law Times*, p. 189, who says:—"The case of *Knox vs. Gye* decides that there is no fiduciary relation between a surviving partner and the representatives of his deceased partner; there are legal obligations between them equally binding on both. There is, in fact, a mere liability to render an account. The statute of limitations applies just as much between surviving partners and the representatives of their deceased partners as between any other persons. The Solicitor General, (Jessel), in opening the present case, expressed some dissatisfaction with the report of the case of *Knox vs. Gye*, but I have perused the report carefully since this case commenced, and I have never read a judgment with which I more entirely concur than that of Lord Westbury: not forgetting either His Lordship's lecture on the use of metaphorical terms, or the peculiar views on the subject once taken by the Court of Exchequer. The law is that the right of a surviving partner to the partnership assets is absolute. The right of the legal personal representatives of the deceased partner is to an account merely of the partnership assets, and to the taking of that, as to the taking of any other account, the statute of limitations applies. In conclusion, I cannot refrain from adding that I sincerely hope the authority of *Knox vs. Gye*, and the principles of law thereby established, will prevent the recurrence of any other suit at all resembling the present." But, of course, the account referred to must be honestly rendered, and there must be no fraud or collusion against the interests of the estate of the deceased partner. An account has been furnished which is impeached as fraudulent; let us see then how the matter stands before the court from the evidence of the several witnesses examined on both sides.

The disposition or sale was by public auction at the Commercial Rooms, on the 22nd December, 1885, conducted by experienced auctioneers, and the plaintiff's interests carefully watched as her appointed agent by one of the most experienced commercial gentlemen in the colony, Mr. T. R. Smith. The time, place, and cash sales were agreed upon with him; advertisement of the intended sale was duly made in three newspapers, with posters, and notices to several persons in the trade, and which secured an unusually large attendance. The defendant Browning's instructions to Mr. Mare, auctioneer, on the occasion were to sell the flour and bread and get the best possible prices for them; that they did not want them if they could get rid of them in any other way; there were several bidders; Mr. Smith bid two or three times and bought 400 bags of the bread, which

he afterwards got Mr. W. Browning to take from him at the same price; William B. Browning, as the highest bidder, bought in the bulk of the flour and bread. Mr. Mare says the sale was made at good prices, and he could have given Browning better flour at the same prices. Mr. Smith took 40 barrels of flour from Browning for same price as purchased—twenty-eight shillings, (28s.), which his customers would not take and he had to dispose of it in supplies to the fishery at twenty-eight shillings and sixpence (28s. 6d.) Several witnesses, apparently most competent to judge of the grade, say the flour was of an inferior character throughout, described to have been tarty, sour, caky and lumpy—it was not fit to be baked up of itself without mixture with other good flour. The prices realized are deposed to by different witnesses to have been excessive, exceptionally good, and by Mr. Smith, agent, as good and satisfactory, he had no reason to find fault with the conduct of the sale, and was present all the time; he did not perceive anything fraudulent; it may have been injudicious for Mr. Browning to bid, but he made no remonstrance to anything done in connection with it, and accepted for the plaintiff the result of the auction. When the trade account for 1884 was prepared in February afterwards, the only thing he objected to and insisted upon being altered was the charge to the individual estate of James of the Woollen factory and Brien's land. The books of the firm were always open for his inspection, and he freely received all the information he required of Brownings from time to time. Some of the brands sold are spoken of by witnesses as of higher marketable value than the auction price, but they knew nothing of the inferior quality of that offered for sale, as did the witnesses who have deposed on that subject. The flour was the balance of some 12,000 barrels in stock at the death of James, and throughout the season attempts had been made through a broker to dispose of it. Some had been sold and part returned again for other brands, from its deteriorated condition, sale could not be effected of more of the lot. It was of old inspection and of less value than of a newer.

Stress, in argument by plaintiff's counsel, was laid on the evidence of Mr. Alexander Harvey, respecting the not giving of samples before the sale from a conversation with Mr. A. Rendell a partner of Mr. Mare's; Mr. Harvey states that: "Prior to the sale I applied to Mr. Rendell, one of the auctioneers, for samples of the flour; I think it was the Friday before the sale; I think the sale was on Monday; I did not receive the samples;

he said he could not give any samples before the day of sale; he thought they were compelled to give them on the day of sale. In the ordinary course I went to the Commercial Rooms on the day of the sale: when I got there the auction was, I should judge, about half over; I went into the auction room; I went in and immediately went out again; Mr. Mare was selling; I think I saw Mr. William Browning there." And in answer to the question: "Will you recollect distinctly, did Mr. Rendell say anything to you about this sale of flour and bread being merely formal, as it belonged to an estate it was a family affair, and asking you not to bid?" answered, "When I met him on Friday I was surprised at his not being anxious to give me the samples in order to make the sale, and when he made the reply I have already given about the samples, I said, 'Why? Do Brownings want to buy it in?' Rendell replied, 'that it was a sale required by law; it is a family matter, and I think Brownings would be just as well pleased if it did not go too dear.' I think that was the whole substance of the conversation." And in reply to the question: "Were you or were you not deterred from going to the auction and bidding for the flour by not getting the samples and by the observations of Mr. Rendell to which you have just referred," answered, "Yes, I was deterred." Mr. Rendell was also examined, who states in answer to the question, "Had you personally any instructions about that sale of flour, and from whom?" "I had no connection with the sale myself, except as to arranging the date of sale and the terms with Mr. Smith and Mrs. Browning. The place of sale was agreed upon—the Commercial Rooms. These arrangements were come to during the month of December, possibly a fortnight before the sale. These instructions were entirely verbal. I remember previous to the sale having an interview with Mr. A. J. Harvey, baker; he was speaking to me about the sale of Browning's flour; he asked me whose flour was being sold; the conversation began by his asking me whose flour was being sold at that date, referring to the poster; I replied, Browning's flour; he asked me if I would let him have samples of the flour; I replied that as there were forty or fifty different samples I did not care to bring them down to him, but that they would be there at the time of sale; but if he sent to G. Browning & Son for the samples he would certainly get them. He said he supposed then it was a family affair, and that the sale was for the purpose of ascertaining the value of the flour. I replied that I expected such was the

case. That was the meaning of what I said ; I don't remember the exact words ; that was the whole of the conversation. My not giving the samples on that occasion did not arise from instructions from Browning's ; I considered it detrimental to the sale to give samples at that time ; when flour is to be sold at auction as this was it is not customary to give samples ; whenever things are sold for the benefit of all concerned as distinguished from an individual it is not customary to give samples. I was present at the sale ; there was an unusually large attendance ; the bidding was far beyond the average bidding at the Commercial Rooms ; there was no hurry in closing the sale ; after the sale I had a conversation with Mr T. R. Smith, I think both at the Rooms and at his office, and we considered the prices at the whole sale were good. In my opinion, as one connected with the trade, the prices obtained were excessive, taking into consideration the quality and condition of the flour, the terms and the time of sale. I had handled the flour before ; the flour was old and of a doubtful nature ; much of it was lumpy. When sales were made previous to the sale of this flour one of the stipulations was, that if any of it turned sour it was to be returned. Previous to the auction sale we had offered it for sale all through the fall at a shilling under the regular market rates ; I effected some few sales ; in one case the flour was objected to, and I think a shilling a barrel extra was paid by the purchaser for an exchange of brands ; the first brand returned was "Gould City Mills," and a shilling extra was paid for an exchange for "Gooderich Mills." I know there were handbills sent around announcing the sale."

I am at a loss to perceive there is anything to be inferred from what occurred between those two gentlemen to the prejudice of the defendants, and I think Mr. Rendell's evidence satisfactorily disposes of any imputation of any sinister conduct on this head. The defendants knew nothing of what passed between them and were acting in harmony with the plaintiff's agent. Samples of the various brands were exhibited at the time of sale for the inspection of Mr. Harvey and all intending purchasers, and he might, for anything reliable we have in the evidence to the contrary, if he had any intention of being a purchaser, have as freely bid as those who did, without being deterred from doing so any more than they were.

We all know auction sales vary considerably, even as regards

similar articles, but after all, when estate property is concerned, it is the most satisfactory mode of disposition, and when properly conducted, as I think this was, the result may fairly be received as the marketable value of the commodity, and especially when the plaintiff's experienced and vigilant agent says "he considered, as the whole trade was represented at the sale, fair prices had been obtained." I am not unmindful of the provisions in the articles of co-partnership that in the event of death the trade was to be carried on as if the deceased partner were alive, and if the survivors had not acted in good faith and had by competition made profit against the interests of the firm, they should be held bound to account for it; but in this case there was no such competition and no use made of the purchased property until after the partnership had fully terminated, and, besides, nothing was concealed from the plaintiff's agent or repudiated by him as regards this property.

The case of *Chambers vs Howell, 11 Beav., p. 6*, is an authority that one partner may lawfully purchase the share of a deceased partner from his representatives, and *a fortiori* he may purchase part of a share at a public auction, with a knowledge of the plaintiff through her agent as in this case, with his expressed satisfaction at the prices obtained.

Now we are asked, after evidence such as has been given, to set aside this public sale as being unlawful and fraudulent, and refer the matter to the master, when we have before us the testimony of those best acquainted with the subject and full data, to enable us to exercise our own judgment.

I am unable to discover anything in the conduct of the partners, auctioneers, or plaintiff's agent which would warrant me in imputing anything wrongful, collusive or fraudulent in the disposition of this property, and which undeserved imputation could not be avoided if the public sale was nullified by a reference at this stage to the master.

I am of opinion with Mr. Justice Little, the account sales of the flour and bread should stand as rendered without further reference.

Since the argument, I understand, the admitted balance has been paid the plaintiff with interest, and should the parties not have arranged other items a reference can be made to the master on application, and decree for payment of any amount that may remain due the estate of said James Browning.

HON. MR. JUSTICE PINSENT:

THIS is a petition for an account of partnership transactions, and, in particular, the plaintiff seeks that it may be declared and decreed that certain landed property has been wrongfully treated in account as the separate property of James Browning, deceased, and charged to his estate, when it really and truly formed part of the assets of the co-partnership which had existed between him and the defendants, and should, according to the terms of the articles of co-partnership, be so dealt with in account, and valued at, and accounted for to the plaintiff administratrix, at the valuation which shall have appeared in the statement made at the end of the year next preceding the decease of James Browning.

The plaintiff further charges and claims that the defendants, in closing the partnership business, made wrongful sale or misappropriation of over 3,000 barrels of flour and 1,900 bags of biscuit, to the loss to the estate of James Browning of about four hundred pounds.

Gilbert Browning, it appears, originally established the business of biscuit-baker. He took into partnership his son, James. Gilbert died in 1882. James continued the business on his own sole account in 1883.

In January, 1884, James, and his mother, Elizabeth, and his brother, William B. Browning, who are the defendants, entered into a co-partnership for ten years, terminable at shorter periods, the business being subject, in the event of the decease of either of the partners, to be continued by the survivors until the end of the year current at such decease, on account of the estate of the deceased and of themselves; and the clause of the articles making provision for this contingency of death, concludes in the following terms:—

“Provided, nevertheless, that for the purpose of arriving at the valuation of the share or interest of deceased, or of his estate, in all lands, houses, buildings, or other property (except money) of the said co-partnership, the valuation of the same as shall appear by the statement or account made up and signed by the parties hereto, at the end of the year next preceding such decease, shall be final and binding.”

The contest here turns upon certain properties known as the “Woollen factory” and “Brien’s land.”

These were purchased by James, in his own name, during the year that he was sole proprietor and conductor after his father’s death of the business of “Gilbert Browning & Son”; but buildings were erected by him upon both the properties and used in

the business, and the expenses of their erection and maintenance charged in the books of his firm.

When he entered into co-partnership with the defendants, it was agreed by the articles—

“That the capital stock of the co-partnership business hereby created, shall consist of all the lands, houses, stores, stock in trade and premises formerly owned or held by the firm of “G. Browning & Son,” the whole being estimated at the value of \$32,000, which is subscribed or provided by the parties hereto as follows, that is to say: the said James Browning, \$16,000; the said Elizabeth Browning, \$13,000; the said William Boyd Browning, \$3,000.”

The articles also provided that the business was to be carried on under the style and firm of “G. Browning & Son,” in the premises on Water street and at River head, lately occupied by the late firm of “G. Browning & Son,” or at such other place or places as the parties should thereafter agree upon.

An account was taken and statement signed at the close of the transactions of 1884, and included as partnership assets the landed properties I have referred to as the “Woollen factory” and “Brien’s,” which had been used by the firm for storage and other purposes. These were valued at \$5,492.90.

The balance then standing to the credit of James, as a partner, was \$16,000.

James Browning died in August, 1885, and the business was, under the terms of the articles, continued to the end of that year by the surviving partners—the defendants.

These defendants contend that the two above-named properties belong to the estate of James, and are not to be taken by them at the valuation made at the close of 1884.

They say these properties had been purchased by James; that the title deeds were and are in his name; that shortly after purchasing them he expressed intentions as to their use and application inconsistent with their being regarded as joint properties or partnership assets; that the act of charging them as such assets, at the end of 1884, was his own.

These expressions of intention, to which a brother of the deceased deposes, were made prior to the co-partnership between the deceased and the present defendants, and cannot countervail the fact that during the co-partnership the properties were entered in the books and treated in the signed accounts as partnership assets, under the head “Riverhead plant,” and that, prior to this, they had entered into the trade of the firm. Moreover, there is the potent fact that no rent is debited to the firm or credited to James Browning for the pre-

mises in question, and that outlays, for instance, rates and repairs, were debited to and borne by the firm.

There can be no question that under the circumstances the "Woollen Factory" and "Brien's" must, in equity, be regarded as the property of the co-partnership, and must, under the clause of the articles providing for accounting in the event of the decease of a partner, be taken by the survivors at the valuation of the year preceding that event.

The next question between the parties to this suit is that of the sale of the flour and biscuit.

The plaintiff insists that the sale was invalid, was, in effect, no sale by reason of the purchase of the goods by the defendants themselves, they, it being contended, being trustees by implication for the plaintiff, or, more correctly speaking, at least subject to obligations similar to those to which in such respects trustees would be subject; moreover, that the sale was effected at a time inconsistent with considerations of prudence and good faith, and that the goods were bought in by the defendants themselves at much below their market value; that the flour, instead of being sold, should have been baked into biscuit at an earlier season, and that the defendants should account to the plaintiff for the proceeds of the flour as afterwards represented by its produce in biscuit.

The defendants say we sold at a time approved of, or at least not objected to, by the plaintiff's agent, Mr. Smith; we sold in the ordinary course after the usual advertisements, in the Commercial Room, upon samples exhibited there, and we purchased in the presence of fair competition at full value, considering the season, and with regard to the flour, its age and quality.

There is on both sides much evidence upon these points, and it is unnecessary now to enter into all the details, upon which my impression upon the weight of the present testimony is adverse to the defendants, as to the sufficiency of some of the prices at which the goods were taken over by the defendants.

If we arrive at the decision that the sale was irregular and void and cannot be sustained, the question of the difference between the price at which the defendants purchased and the market price, or true value as assets, will be matter for the master upon a reference, unless the parties can otherwise adjust their differences in these respects.

The evidence satisfies me that the plaintiff has not made out a sufficient case to impugn the sale, if it were otherwise good, upon the ground of selection of an improper season.

Looking at the fact that the period for winding up the partnership accounts was drawing to a close, and that, as appears from Mr. T. R. Smith's evidence, this manner of disposition of the property and the time and place met with his approval, it would be difficult to impute to the defendants any desire in these respects to secure an advantage for themselves to the injury of the plaintiff, or to say that the plaintiff could now repudiate this manner of ascertaining the value for the purposes of accounting.

The question of the defendants' bidding and buying in, is quite another matter.

The defendants rely for confirmation of their conduct in this respect upon any absence of express disapproval on the part of the plaintiff's agent, or any express fault being, after the sale, found by him as to the purchase by them, and his general acceptance of the accounts; but in his evidence Mr. Smith says he knew nothing of any pre-arrangements calculated to interfere with the bidding, but that he should consider the withholding of samples before the sale prejudicial to it, and would deem requests to persons not to bid as fraudulent, and the purchase of the property by the partners as anyway injudicious.

Upon this last point, the law is thus clearly expressed in Lindley on partnership, "The court is extremely reluctant to give parties who have the conduct of a sale liberty to bid at it; if therefore they desire to bid, some arrangement has generally to be made respecting the conduct of the sale"; and it is similarly laid down in numbers of cited cases.

In this case there was no such arrangement; and the law is as clear with regard to the conduct of surviving partners towards the representatives of one deceased, after the partnership has been dissolved by death, as it is with regard to the conduct of partners *inter se*, that they can derive no profit from a transaction concerning the partnership business which will not inure for the benefit of the firm.

The fact of the surviving partners here who had the conduct of the sale being the purchasers, in the absence of any express agreement or concession that they might be so, and of any express confirmation after the sale, with knowledge of the circumstances, is sufficient in itself to give the plaintiff a right to inquire as to the disposition of the property, and whether any, and if so what profit, was made by the partners; in other words, to ascertain what the true value of the property in the hands of those partners was, at the time of its appropriation by them.

But there is a great deal more than that in this case, to entitle the plaintiff to a reference.

It appears that Mare & Co. were the auctioneers employed by the defendants to make sale of the flour and biscuit, (the evidence of R. L. Mare and A. S. Rendell of that firm, is put in on behalf of the defendants), and we have before us the evidence of Alexander J. Harvey, an uninterested witness on behalf of the plaintiff, and who is himself extensively engaged in the same line of business as the defendants, and would probably have been a large purchaser of the flour. Mr. Harvey deposes as follows:—

“Prior to the sale I applied to Mr. Rendell, one of the auctioneers, for samples of the flour. I did not receive the samples. He said he could not give any samples before the day of sale, he thought they were compelled to give them on the day of sale. In the ordinary course I went to the Commercial Rooms on the day of sale. When I got there the auction was I should judge about half over. Mr. Mare was selling. When I met Mr. Rendell on Friday, I was surprised at his not being anxious to give me the samples in order to make the sale. I said “why do Brownings’ want to buy it in?” Rendell replied that ‘it was a sale required by law. It is a family matter and I think Browning would be just as well pleased if it did not go too dear.’”

This witness, (Mr. Harvey), further states that he was deterred from going to the auction and bidding for the flour by not getting the samples, and by the observations of Mr. Rendell.

Mr. Rendell (of Mare & Co.) gives a somewhat different version of this story. He says: “I remember previous to the sale having an interview with A. J. Harvey, baker. The conversation began by his asking me whose flour was being sold; I replied, Browning’s flour. He asked if I would let him have samples of the flour; I replied, that as there were forty or fifty different samples I did not care to bring them down to him, but they would be there at the time of sale, but if he sent to G. Browning & Son he would certainly get them. He said he supposed it was a family affair, and that the sale was for the purpose of ascertaining the value of the flour; I replied, I expected such was the case.”

This witness speaks of the auction as one “for the benefit of whom it might concern”; a description singularly suggestive of cheap sales for the benefit of somebody.

If there had been an understanding between all the parties that the defendants might buy in, it would manifestly have been one to be carried out by the sellers, with a cautious regard for the interests of all other interested parties, and in the strictest good faith.

The evidence I have quoted with other testimony in the case is not consistent with that assumption.

If leave to bid had been granted to the defendants by the court, or by arrangement between the parties, the purchase made by them could not under the circumstances be allowed to stand.

The question now before the court is, not whether the accounts are correct in amount, but whether there should be a decree for account and reference, and what the principles are upon which the accounts should be taken and by which they should be governed.

I, therefore, offer no opinion now upon the sufficiency or insufficiency of the prices credited to the plaintiff for the flour and biscuit.

The plaintiff, in my judgment, is clearly entitled to a reference and inquiry upon the accounts, and particularly as to the value of the goods retained by the defendants upon the assumed purchase by them; but regarding the assent to a disposition by sale, at the time and place before described, that inquiry should, as to the flour, be confined to its value as such, and should not be based upon that of its subsequent produce or profit as biscuit, and the valuation generally should be regulated by regard to the length of time the property had been in the market, to the season of the year at which it went into the defendants' stock after the sale, to its quality then, and to the fact that the sale, if it had been duly carried out, was to be a cash sale and not one on time.

I regret that there should be upon this last point a difference of opinion between my brother judges and myself, for I think that to uphold the sale of the flour and biscuit is to create a precedent dangerous in itself and inconsistent with all recognized authority.

HON. MR. JUSTICE LITTLE:

From the bill and answer filed in this suit in May, 1886, the evidence taken *de bene esse*, and the statements of counsel at the argument heard thereon on the 20th of December last, it appears the defendants on the 8th day of August, 1884, entered into and executed regular articles of partnership for the continuance of the trade and business of biscuit making and for the importation and selling of flour as formerly carried on by the late Gilbert Browning and James Browning, under the style

and firm of "G. Browning & Son," and solely conducted by the said late James Browning, under the same style and firm, from the death of the said late Gilbert Browning up to the 31st December, 1883.

These articles of agreement related back to and were to take effect from the first day of January, 1884 and contained the usual provisions for the management and conduct of the trade and business, and set out the value of the capital stock at \$32,000; apportioned the contributions thereto of each of the parties, limiting the duration of the partnership, stipulated for the periodical settlement of the accounts of each year's transactions, &c., and the obligation of each partner to be bound thereby, and providing that in the event of the death of any of the parties during the continuance of the partnership, the business was to be continued until the end of the current year of such demise.

Under these articles the business of the co-partnership was successfully carried on up to the fifth day of August, 1885, when James Browning, the principal partner, died intestate, leaving a widow, the plaintiff, and three infant children him surviving.

The plaintiff was duly appointed administratrix to the estate of the deceased, notified the surviving partners of her desire to have a full and *final* settlement of the accounts of the said partnership business in accordance with the terms of the said articles of agreement, and the payment to her of the amount due or coming to her late husband's estate for his interest in the partnership business.

The trade and business had, it appears, been continued up to the end of the year 1885, and on or about the month of February following the yearly account or balance sheet containing the annual statement of the transactions of the co-partnership for the preceding year, and its property and plant, was furnished by the defendants to Mr. T. R. Smith, acting on behalf of the plaintiff as her agent.

To this statement of account or balance sheet exception was immediately taken by those acting in the interests of the plaintiff, and it would appear that the nature and character of the grounds of the objection rendered it mutually desirable to the parties that an adjudication should be had thereon at the hands of this court. Although a great deal of evidence has been taken *de bene esse* on both sides, and much has been urged at the hearing of the argument on the general affairs of the co-partner-

ship, and incidents in relation to it, still it appears the grounds of contention can now be narrowed and confined to only two questions. The first of these is whether certain lands situate at Riverhead, and purchased by the late James Browning, should appear in the annual statement or trade account as assets of the co-partnership? Or whether they are not solely chargeable to the estate of the late James Browning, as his separate property?

From the evidence it appears this land consisted of two lots or parcels, one of which was purchased by the deceased in March, 1883, for \$1,200 from the directors of the Woollen factory company, is situated at Riverhead, and immediately to the eastward of the bakery and premises owned by the co-partnership; the other parcel of land, with erections, is nearly in the same locality, and was also purchased by the deceased and conveyed to him by deed from one D. Brien, for \$600.

On the first named piece of land there has been erected a commodious store, the cost of which was charged to the partnership business, and the details of the expenditure incurred in its erection appear in the books of account of the firm. This building was, and continued to be used for the purpose of the trade and business of the firm. All charges for insurance on it and for repairs thereto, as well as on the erections or buildings on Brien's land, were in like manner charged to the business and entered in their books of account.

But the most important circumstance connected with, or having relation to the respective interests of the parties in these lands, is that which presents itself in the admitted and, since undisputed, stated annual account or balance sheet for the year 1884, bearing date the 31st day of December of that year, containing a statement with valuations of all the property, stock in trade, plant, etc., of the co-partnership business of James, Elizabeth, and William B. Browning, as such partners, and duly signed by them on the 20th of February following. In this balance sheet are included these two parcels of land and erections, with their valuations, as part of the partnership assets. To confirm the rational and only conclusion to be drawn from these facts, it is in evidence that at the time of entering into the *articles* no question was raised about treating these lands as other than partnership property, and they were then so recognized; that the expenditure incurred in the erection of the buildings on the Woollen Factory ground, and the further entries in the books of the firm against the trade account of the

charges for repairs, insurance, etc., on what are called Brien's houses, were at no time objected or excepted to. And it was not until the accounts and balance sheet for 1885 were being prepared and furnished Mr. Smith (as such agent of plaintiff), that any exception was taken or question raised by defendants to the character which these lands should assume in the accounts of the firm.

Under such circumstances and facts it is not very difficult to determine on the claims of the respective parties, in relation to the position they should hold towards these lands; and if there were no other grounds than these patent on the trade statement of 1884, sufficient would be shown, as opposed to other evidence on record, that these lands are partnership property. The partners signing that statement appear to have acted *bona fide* with each other on the occasion, and it remained unimpeached and unquestioned, and is so far binding on all the parties and their personal representatives. *Ex parte Barber*, 5 Ch. 687; *Lind on Part.*, s. 2, p. 263, &c.

Therefore from the facts of record and the law as applicable to these, it must be determined that these lands formed part of the assets and property of the partnership and business so entered into and continued by the late James Browning and the defendants.

The determination of the contentions of the parties on the other and principal subject of dispute, arising out of the trade account for 1885, was involved in somewhat greater difficulty; and the evidence in relation to it shows that, at the time of the death of the deceased partner, there were in stock about 12,000 barrels of flour and a large quantity of bread (about 2300 bags). The flour had been imported by the firm from Canada during the then current year, and on or about the 15th day of December, 1885, some 3119 barrels of it and 1900 bags of bread were sold at public auction at the Commercial Sale-room, by Mare & Son (Brokers) on account of the said co-partnership. At this sale W. B. Browning, one of the partners, became a purchaser of the greater part of the flour and also a portion of the bread.

The plaintiff charges in her petition that this sale entailed considerable loss to the interests represented by her, the flour and bread not having been disposed of at "a fair and true value, and that the disposition thereof was entirely fraudulent."

There is no doubt whatever of the well recognized duty, primarily imposed on partners and applied to and governing

their relations *inter se*; they are bound to carry on the business of the partnership for the greatest common advantage; to exercise the utmost good faith towards each other; to render full information of all things affecting the partnership to any partner or his legal representative. The obligation of *uberrima fides* is incidental to the nature of their contract, and a clause to this effect is almost always inserted in their articles of agreement to remind them of the duties imposed on them by the general law. *Pollock on Par.*, p. 68.

Again, it must be admitted (although a contrary doctrine was forcibly contended for by the learned counsel for the plaintiff in its application to this case) that a surviving partner may sell, or cause to be realized, the assets of the partnership business: purchase the interest of a deceased partner: and may become the purchaser of the partnership property. *Lindley on Partp.*, v. 8, p. 1026; *Knox vs. Guy*, 418 L. J. Ch. & B 273, 6 Ex, 164; *Crawshay vs. Crickett*, 15 ves. 226.

The reciprocal rights and duties, as well as the powers, of parties so associated in trade and acting under circumstances bearing some relation to these in issue, are referred to in the judgment of the Master of the Rolls in the case of *Chambers vs. Howell*, 11 *Ber. Repts*. No doubt when such a relation subsists between the parties, courts of justice will look at such transactions with close attention; for in dealings between the executor of a deceased partner and the surviving partner there may be an inequality in respect of knowledge which may be taken advantage of in such a way as to lead to very inequitable and unfair results. But these circumstances, if they exist, must not only be distinctly alleged, but must also be *shown by some sufficient evidence*, and they are not to be inferred by mere relation between the parties.

Therefore, fully recognizing the importance of the observance of these rights and duties, and the exercise of that strict fidelity in the general conduct of partnership transactions, it behooved the court to see from the evidence that the parties to these proceedings adopted and observed such a course of conduct in the realization of this property as can be warranted and justified by the circumstances.

From the testimony of the many witnesses examined, and from the statements in the exhibits in evidence, it appears these 3,119 barrels of flour were all that remained out of some 12,000 barrels referred to, the rest having been sold and disposed of

from time to time by the defendants for the benefit of the partnership business.

It will be seen by reference to the evidence of Mr Smith that he pointed out to the defendants the necessity of closing the affairs of the partnership business to the end of the year, and was induced to do so by reference he made to the articles of partnership. This fact, together with the expressed desire on the part of the plaintiff herself, as deposed to by one of the defendants, to have the accounts finally closed with them, and to withdraw any money found due to the deceased partner, from the partnership business, and willingness of the defendants to close, rendered a final sale of the remains of their stock necessary. As to the opportuness of the sale, they all appear to have determined on having it before the end of the year, and Mr. Smith states "it might have been better if it had been earlier, but he did not urge it"; the place, the Commercial Sale Rooms, and as to the terms or conditions of the sale, it is again stated by Mr Smith, "As he did not consider the Brownings would be justified in running the risk as far as James Browning's share was concerned, to sell on other terms, he probably advised the sale to be for cash."

Therefore, both the plaintiffs, represented by a most experienced and reliable agent, and the defendants, in the interest of the co-partnership, agreed on the sale, and one of the defendants instructed the brokers accordingly to proceed with it. The brokers depose to having given the sale the utmost publicity through three newspapers and by posters and hand bills; that there was an unusually large attendance thereat, and the bidding was far beyond the average, and satisfactory prices were realized for the property then sold, consisting of the flour, bread, and other articles, part of the remains of the said stock in trade. Some forty barrels of the flour were brought there by defendants as samples of the lot so to be disposed of. W. B. Browning, one of the defendants, became a purchaser of the flour, and Mr. T. R. Smith bid for and purchased some of the other articles sold. The brokers also state that the flour was of a very unsatisfactory quality, some of it being old and lumpy. They had the selling of it by private sale during the fall, and had great difficulty in disposing of it because of its quality. Mr. Smith, after the sale, purchased some of it from W. B. Browning for the same price paid for it at the auction, and found that it did not please his customers, and consequently gave it out on supplying account. Some had also been purchased some time previous to

the auction by a firm of wholesale dealers in provisions, one of whom deposed that owing to its condition their purchasers objected to it. The master baker at Browning's bakery deposed "that this flour was unsound at the time of the sale; a good deal of it was a little tarty and caked around the heads; they were baking a little of it shortly before the death of James Browning, and the witness noticed the state of it, and that it was going then."

In addition to this evidence as to the quality, there is also much deposed to by the Messrs. Browning to the same purport, and these, together with the last witness, depose that owing to its inferior condition it was found necessary to mix it with a superior quality of flour in manufacturing it into bread, and that it was so used or baked up in the months of January and February following the sale thereof. As to the prices obtained, they appear, as already stated, to have been satisfactory to all the parties interested; and when in February the trade statement was furnished and examined, plaintiff's agent took no exception to this transaction, but confined his objections altogether to the disputed land matters already disposed of.

The evidence of the three reliable and experienced witnesses, examined in support of the plaintiff's contention, was in the main directed to the price in the market at the time of flour of similar brands and inspection to that disposed of on this occasion. But no one of these gentlemen knew anything of the quality or condition of this particular flour then or subsequently; one of them deposed to the alleged refusal, and certain observations anent that refusal, of one of the brokers named to supply him with samples of the flour before the sale; and it is to be regretted this reasonable application was not promptly acceded to.

The subsequent explanations of witnesses and of the parties in reference to this matter, and the purport of the conversations referred to as appearing in evidence, relieve the defendants of a difficulty which otherwise might have seriously affected their position in this connection.

Other portions of the evidence of the witnesses examined tended strongly to support the contention of plaintiff's counsel that the sale was at that time most inopportune, and the place where it was held, and the terms on which the property had been disposed of, were equally objectionable, and not calculated to secure ready purchasers or remunerative prices.

From a careful perusal of the evidence it is apparent the sale

of this flour, bread, and other articles forming part of the remainder of the stock in trade of the said partnership business, was agreed and determined on, and the time and place, details and conditions thereof, pre-arranged by the parties alone interested in its result, and that result was subsequently considered by them as satisfactory.

The purchasing or bidding by the surviving partner under the circumstances as explained in the testimony, (although it cannot be characterized as illegal) might, as stated by Mr. Smith, "be considered injudicious"; and if the parties had abstained altogether from such bidding the impression of unfairness might not have arisen in the minds of these subsequently acting in the interests of the plaintiff. This incident of bidding coupled with the stated tenor of the conversation relating to the alleged refusal of samples offered strong grounds to justify parties entertaining the unfavorable opinions which may have led up to these proceedings.

However, I consider it is now sufficiently shown by the evidence that there was no "inequality in respect of the knowledge of all the parties to the character or value of the property sold, nor any unfair advantage taken by the purchasing partner to lead to inequitable or unfair results"; these having the carriage of the sale were actuated by a desire to realize to the best advantage; that the defendants were not privy to anything that occurred relative to the alleged refusal to supply samples and acted in concert with the plaintiff or her recognized agent in this matter. By them the sale was deemed necessary, all the customary and usual proceedings regulating such transactions were apparently observed for holding and conducting the auction openly and publicly and it resulted in securing prices and values which met the approval of the brokers having carriage of the sale, and the expressed satisfaction of the defendants and the agent of the plaintiff.

The bidding by one of the partners has not been shown to have in any way affected the minds of outside bidders in preventing fair competition at the sale; and I consider the objection taken to it does not contain sufficient grounds to vitiate a transaction in all other respects fair and lawful.

The generally inferior quality of the flour is abundantly spoken to by the witnesses, and, as indicated by their evidence the value or prices would rule in accordance with that quality or character.

I cannot, therefore, see that the court would be justified, on

the evidence given on behalf of the plaintiff, in declaring that the disposition of this property under the circumstances "was fraudulent, or that it resulted in great loss and damage to the co-partnership," nor can I see any grounds which would warrant the court in ordering a reference on the question of the values or prices which the property realized, as further evidence of the same purport, with that already given as to the values of flours of the like brand and inspection, could not lead to any other determination or solution than that which one must arrive at from the data now before the court.

Sir W. V. Whitway, Q. C., for plaintiff.

Mr. Kent, Q. C., for defendants.

IN RE JACOB CHAFE.

1887, *February*. HON. MR. JUSTICE LITTLE.

Will—Invalid—Agreement, certain next of kin to give effect to.

The testator executed a document as his last will, which was invalid and not admitted to probate. Administration was granted on the petition of certain of the next of kin, and it was agreed that the administrator should distribute the estate in accordance with the terms of the document executed by the testator. This was afterwards opposed by those of the next of kin who were not parties to this arrangement, and who claimed a distributive share, as in the case of an absolute intestacy. On application by the administrator for direction of court—

Held—Those of the next of kin who signed arrangement giving effect to testator's will are bound by everything done under it by the administrator, but such an arrangement can have no effect, nor is it in any way binding, on those who did not sign it. No agreement, however solemnly entered into by any number, could bind others who refused being a party to it.

THE matters submitted to the court by the administrator of this estate, with the assent of those entitled in distribution as next of kin of intestate, for the directions and further orders of the court, were heard on argument, in which all parties so entitled were represented.

From the facts relating to the case so submitted, it appears the late Jacob Chafe, some short time before his death, which occurred in May, 1878, executed a document as and for his last will and testament, which was subsequently found to be ineffectual as such, and was not admitted to probate.

Intestate left a widow and eight children him surviving, all of whom entered into an agreement in writing binding themselves to accept and abide by the terms and conditions set out and contained in said document or alleged will, and authorized David Chafe, a brother-in-law of intestate, to apply for administration to said estate, and on his application being so made to the court, he was in due course appointed administrator.

It appears the affairs of the estate were thereupon and thenceforth managed by the administrator, in pursuance of and in accordance with the terms of the document so executed by the said Jacob Chafe, up to and until the death of his said widow in May, 1886; that, according to the provisions of said paper writing; on her demise, the estate was to be distributed as therein directed.

It also appears that in the year 1864 a daughter of the said late Jacob Chafe, named Elizabeth, died, leaving her husband, Ambrose Chafe, and four children her surviving, and that at the time of the death of the late Jacob Chafe the children were not of full age, nor were they or any of them in any manner party to the agreement as entered into by the next of kin.

Beyond the annual payment to Harriet Chafe, the widow of Jacob, as provided by the testamentary document, no interference with or disturbance of the assets of the estate has taken place, and the status of the next of kin is the same as when administration was granted, excepting the occurrence of the death of a son named Henry George, and the attainment of age of the said children of Elizabeth. The executors of Henry George are also willing and desirous of carrying out the terms of the agreement in question, and to which he was an assenting party.

The next of kin who now appear to be opposed to the arrangement so accepted and acted on by them, are Thomas William Chafe and Amelia, his wife (a daughter of said late Jacob), who allege that at the time they agreed to give effect to the document referred to they were not made aware of its invalidity as a will. But it is sufficiently apparent from the character of the agreement signed by them, and the affidavits annexed in proof of its execution, the assent also signed by them for the grant of letters of administration, and the perfect silence of the parties on the subject up to the present, that they must have thoroughly understood the nature of the agreement and the results attendant on their deliberate acts in that behalf.

The only other dissentients are three of the children of intestate's daughter, Elizabeth, who, through their counsel, Mr. McNeily, Q. C., contend, as they are in no way parties to the agreement, they are not bound by it and are entitled to that distributive share of the estate their mother would have been entitled to as one of the children of the intestate. The fourth child of Elizabeth Chafe was represented by counsel (Mr. E. P. Morris), who expresses the desire of his client that the terms of the agreement should not be departed from.

The questions then submitted by all the parties so interested in the distribution of this estate, and on which their counsel sought the decision and direction of the court, were:

Whether the next of kin of said intestate are bound by the agreement entered into for the management and final distribution of the said estate, and if the administrator is authorized in distributing in accordance with the terms of the document so executed by intestate, and which formed the basis of that agreement? Or whether the administrator will distribute the assets of said estate as in the case of an absolute intestacy? And, in either case, what rights, if any, have the said children of Elizabeth, as such grandchildren of the said Jacob Chafe?

There can be very little doubt as to the position of those of the next of kin who were legally qualified to enter into the agreement signed by them, giving effect to the paper writing intended to be, and executed by the deceased, as and for his last will and testament. From the proofs accompanying that agreement, and the affidavits since filed in relation to the circumstances attending its execution, it is clear all parties to it were well aware of the invalidity of the document as a will, and the necessity of giving its contents effect by the writing or agreement entered into by them.

The administrator for the past eight years acted on the understanding and agreement so arrived at in relation to the affairs of that estate, and all the next of kin who were parties to it would be obliged to perform and abide by its conditions.

But if there are other next of kin who were in no way parties, and now decline being parties, to that arrangement, and who are entitled to participate in a distribution of the estate, then the agreement would be no longer of any force or effect. All of the next of kin entitled in distribution must then occupy that position towards the estate which they are legally entitled to, and no agreement, however solemnly entered

into by any number, could bind others who refused being a party to it.

The administrator in that case would not be authorized in distributing or administering the assets otherwise than as the law directs in cases of intestacy.

As the daughter (Elizabeth) pre-deceased the intestate, and her children were in no way bound by the agreement referred to, they are entitled to a distributive share in the estate, and take *per stirpes*, that is, not in their own right but by representation.

In view of the character of the assets of this estate, consisting of lands, fishing rooms, moveable chattels and monies, and the desire expressed by nearly the whole of the next of kin, it would appear to be most desirable in the interests of all that a realization of the assets should not be forced on the administrator; for, as was observed at the argument by counsel, if a sale of the property were now enforced or insisted on, a heavy loss would result and a final satisfactory settlement would be delayed; and more particularly in relation to and by reason of the one-third share of the whole value or proceeds of the estate, which should be set aside for the estate of the widow of the intestate.

As, however, a willingness has been expressed since the argument to enter into an arrangement for the payment to the grandchildren of such an amount in cash, as, from a reference to the master for that purpose, may be found to be the value of their interest in the estate, it is considered advisable to allow the parties time to consider their position, and, if possible, finally carry out a proposal so desirable and beneficial to the interests of all.

To permit of this the court will await the further motion of any of those interested in the proposed arrangement, before finally disposing of the matters submitted and passing on the interests of the parties under the altered condition of their relations to the estate.

Mr. Johnson, Q. C., for administrator.

Mr. McNeily, Q. C., and *Mr. E. P. Morris*, for next of kin.

1887, *April*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Will—Construction—Trust—Gift of corpus with restraint on anticipation.

Testator bequeathed £10,000 in trust for the use of two sons, share and share alike, for life; on the death of either, then a moiety to children of deceased son until decease of surviving son, and the other half for use of surviving son, when, on his death, the whole to the use of the children of sons, share and share alike. One of the sons died, and the guardian of his infant child claimed that half of the sum became an absolutely vested interest in the infant, and subject to future contingency. On seeking direction from the court—

Held—That only a life interest is provided until the death of testator's surviving son, when his grand-children have to be ascertained, and these will then take the whole *per capita*, not *per stirpes*. The whole of the bequest vests in the trustee till the death of the surviving son. The guardian of the infant is entitled to interest on the moiety, but not to the *corpus*. (The Chief Justice, though not affirmatively deciding, was of opinion that the *stirpital*, and not the *per capita*, construction was more consonant with the intention of testator).

THIS is submitted as a special case for the opinion of the court, on the claim of the plaintiff as guardian, aforesaid, under the last will of the late Mr. Edwin Duder, of which the defendants are the surviving executors, and took probate.

The testator, who died in the month of February, 1881, left him surviving a widow, since deceased, who was a joint executor with the defendants, and three children, viz.: Edwin John, Arthur George, and Harriet Elizabeth Ann. Arthur died in December, 1881, intestate, to whose estate his widow was granted letters of administration. He left one child only, an infant, now living, to whose estate and effects the plaintiff received letters of guardianship. Harriet Elizabeth Ann died in November last, 1886, leaving no child or children, and the said Edwin John is still living.

The clause of the said will upon which the claim of the plaintiff is based, is as follows:

Fifth.—I give and bequeath to my executrix and executors the sum of four thousand pounds currency, upon trust for the sole and separate use of my said daughter Harriet Elizabeth Ann. I also give and bequeath to my executrix and executors the further sum of two thousand pounds, cy., and also the further sum of eight thousand pounds currency, the last mentioned sum to be paid to my executrix and executors out of my residuary estate by my said sons Edwin John and Arthur George, by successive annual payments of one thousand pounds, the first of such annual payments to be made at the expiration of two years from the date of my decease, for my executrix and executors to hold the said last mentioned sums of two thousand and eight thousand pounds upon trust for the sole and separate use of my said daughter for her life, and after her decease, for the use of her children, share and share alike, and in case she shall die leaving no

child or children her surviving, then to the use of my said sons, share and share alike, for life, and upon the decease of either of my sons, then one half thereof to the use of the children of the deceased son, until the decease of my surviving son, and the other half thereof to the use of the survivor of my sons for his life, and after the decease of the survivor of my sons, then the whole to the use of the children of my said sons, share and share alike; and should the son which predeceases the other leave no lawful issue him surviving, then the whole to the use of my surviving son for his life, and after his decease to the use of his children, share and share alike; and should both of my sons die without leaving lawful issue them surviving, then to the use of my next of kin. Provided that nothing in this clause shall be construed as rendering it obligatory upon my sons to give security to my executrix and executors for the due payment of the said sum of eight thousand pounds, and they may pay off the said sum at any time within the said period of eight years allotted for the payment of the same, but until the same is paid there shall be paid annually, out of my residuary estate, by my sons, interest at the rate of four per cent. per annum, on the balance unpaid, the said interest to be paid to my daughter Harriet Elizabeth Ann, for her sole and separate use, the said interest to commence and be computed from the expiration of one year after my decease.

The letters of probate, administration and guardianship, also the petition on which the same were granted, together with the will of the said Edwin Duder, were to be considered exhibits in this case, and to be referred to as forming part of the same.

The parties were heard by counsel, and at the hearing Mr. Edwin John Duder was made a party with consent.

I may observe *in limine* that the testator, after various bequests, devised and bequeathed all the rest and residue of his estate, effects and property whatsoever, to his said sons Edwin John and Arthur George, *share and share alike, and their assigns*, subject to the payment of the sum of eight thousand pounds currency, mentioned in the above clause fifth.

The plaintiff, as guardian aforesaid, by the case claims "that the principal money, or sum of five thousand pounds currency, a moiety of the said sum of ten thousand pounds mentioned in the said recited clause, is now vested in and payable to him as such guardian by the executors aforesaid, and has been so vested since the death of the said Harriet Elizabeth Ann, which is contested by the defendants."

There were no cases cited on either side for or against these positions, and no specific questions are raised in the case for the direction of the court, as is usual and proper.

It may be regarded as an established rule that a bequest of the income of property without limitation as to time is equivalent to a gift of the capital or principal where no other dispo-

sition of the capital is made,—*Hawkins on Wills*, 123 *Theobald*, 2nd ed., 374,—unless there is something on the face of the will to show that such was not the intention,—*Adamson v. Armitage*, 19 res. 418. As an instance of the effect of limitation in circumstances and time, I may refer to a case decided so recently as in October last in *re Grey's Settlements*, 35 *W. R.* 287, when a gift was made through trustees to a daughter *absolutely* for her sole and separate use independently of marital control and *without power of anticipation during coverture*. On application for the payment over of the corpus to her, while the general principle was recognized, it was held that she was entitled only to the income during coverture, and that effect must be given where it can be to every word of the direction of the testator; to which I add from *Williams on Exrs.* 1085, “provided an effect can be given to it not inconsistent with the general intent of the whole will taken together.”

The construction of a will is to be made upon the entire instrument and not merely upon disjointed parts of it, and consequently all its parts are to be construed referentially to each other,—*Ib.* and notes. In *Abbott vs Middleton*, 7, *H. L. C.* 68, Lord Cranworth says: “It is not the duty of a court of justice to search for the testator’s meaning otherwise than by fairly interpreting the words he has used,” and in the same case Lord Wensleydale says the true question is, “What that which he has written means.”

It will be observed that £8,000, part of the £10,000 mentioned in clause five, was to be paid to the executors from the residuary estate by the two sons, to whom and their assigns the same was bequeathed, *share and share alike*. After Harriet’s death, without children, this £8,000 was to go to the use of the sons, share and share, for life; upon the decease of either, then one-half to the use of the children of the deceased son, *until the decease of the surviving son*, and the other half for life to him, and, after his death, the whole to the use of the children of the said sons, share and share alike. Had Arthur George died without a child, the whole would have gone to Edwin John for life, and afterwards to his children, but it was only in the event of both dying *without issue* that it was to go to the testator’s next of kin. The capital on which the infant is entitled to the interest is £5,000, the moiety of the £10,000 aforesaid, and, assuming that five payments have been made on the £8,000 by the residuary legatees, there are three more to be made, carrying interest in the meantime at four per cent.,

as provided by the will. Now, while the infant, through his guardian, the plaintiff, is unquestionably entitled to the interest on the moiety aforesaid, yet I do not think the corpus or capital, or any part thereof, is claimable until the decease of Edwin John, the now survivor, as I hold, upon the authority of the case I have cited and like cases, that, where it can be done and is not antagonistic to the language of other parts of the will and the apparent meaning of the testator, effect should be given to every word.

It was contended on behalf of the executors that the court cannot now pronounce as to the share or portion of the principal to which the infant is entitled, nor until the death of the survivor, as that is the time apparently appointed for distribution, when, by the bequest. "the whole is to go to the use of the children of my sons, share and share alike," which, as argued, will be per capita, and until the number is ascertained there can be no apportionment.

Without in any way recognizing a per capita apportionment, yet, as there is a conflict in opinion on the subject, it appears to be unfair to pronounce definitely on the rights of parties not before the court and not in *esse*, and it is laid down in *Bright vs. Tyndall*, 4 *Ch. dir.*, 189, which was a special case where a declaration was asked dependent on events that had not arisen, that there was an obvious objection to making a declaration of future rights, but it is in the power of the court to do so where the interests of justice seem to require it.—*Bogg vs. Mid. Rl. Copy*, 4 *Eq.* 314.

While for the above reason, and in the absence of any specific question raised in the case for our determination, whatever may have been the course of argument at the bar on the point, I do not assume to decide on the per capita or other construction; yet, I cannot forbear from stating my present impression, and that, too, after a very careful consideration of every part of the will which would enable me to arrive at the meaning of the testator, and the examination of authorities bearing on the subject, that the stirpital and not the per capita construction is seemingly more consonant with the intention indicated throughout the will. It would require language of the clearest import, which I have not discovered in this will, to divest a child or children of a fund expressly given and fixed, or to vary its amount or income therefrom on the death of another, especially with the relationship in this case, contingent on the number of his children. I would refer to *Theobald on Wills*, 2 *ed.*, p. 254,

and authorities cited for the position, where it is said: "It seems clear that on a gift to A. and B., as tenants in common for their lives, and then at their death, or at the deaths, or at the death of A. and B., to their children, goes, upon the death of each tenant, for life to his children."—*See also Wells vs. Wells, 29th Eq., 342.* But, as before observed, effect ought to be given to the direction of the testator as to the period for payment or distribution, if that can be ascertained, as I think it can in this case. If this view should be held to be correct, then the claim of the infant to a moiety of the principal would be a vested right, although payable at a future time, and, as a consequence, if disposed of, would, in the event of death, belong to his personal representatives. In the interim the executors will be authorized in paying the annual income to the plaintiff, as guardian, for the use of the infant.

The costs of each party, as solicitor and client, to be paid out of the fund.

HON. MR. JUSTICE PINSENT:

The guardian for the infant son of Arthur George claims that half of the sum of £10,000 of which Arthur George had the use in his lifetime, has, through his death, become an absolutely vested interest in the infant and is subject to no future contingency; that the remaining half continues for the use of Edwin John, and in the event of his decease, without children, would become the property of the infant.

The result of my endeavours to give effect to the intentions of the testator, so far as they can be gathered from this bequest, is one at which I conceive there is little or no difficulty in arriving.

Harriet dying, the sons were to "share and share alike *for life*"; but one of the sons having died, the use of one half goes "to the use of the children of the deceased son *until the decease of my (the) surviving son*, and the other half to the use of the survivor *for his life*." Then the periods of the absolute vesting of the principal sum is declared in these words, "and after the decease of the survivor of my sons, *then the whole*," (i. e., the two halves collectively) "to the use of the children of my sons, share and share alike."

It appears to me that the manner of devolution of this property and the contingencies upon which it is dependent are sufficiently clear and intelligible.

Life interests are provided for until the period of the death of the testator's surviving son, when his grandchildren have to be ascertained, and these will then take the whole £10,000, "share and share alike," i. e., equally between them, *per capita*, and not *per stirpes*. The expression "share and share alike" after the words "to the use of the children of my sons," has reference to the children of the sons, (i. e., the grandchildren of the testator), not to his sons who will already have enjoyed their life interests, and is not equivalent to, but entirely different from such language as that one half of the £10,000 should go to the children of one son, and the other half should go to the children of the other. In such a case, it might be contended that the death of the testator's last surviving son marked simply the period of distribution. The scheme which the testator lays down for the disposition of this part of his estate, in the event of the death, childless, of his daughter Harriet, seems to be designed to preserve it as long as possible to his descendants with the desire to vest it eventually in his grandchildren as a class.

There is one hiatus in the disposition of this money, viz.: for a possible period between the death of the infant and the death of the testator's last surviving son during which there is no appropriation or use provided for the income of the fund, (Arthur's half.)

The authorities seem to be clear that in such a case the accumulations would form part of the principal sum, and thus in this case devolve with the "whole."

Our judgment, while concurrent in its result, is not based upon precisely similar grounds, so that there will be nothing to prevent the widow of Arthur and others interested in placing a different construction upon the will from that which I put, from raising the questions again if the contingencies arise which might make them the subject of future controversy.

In the meantime the court is unanimous in holding that the half of the £10,000 is not now a subject of transfer to the guardian of the infant son of Arthur, but is to remain in the hands of the trustees; but we also agree that the case is one in which the costs of the proceedings, being for the instruction and guidance of all the parties, are fairly chargeable as between solicitor and client as against the whole principal fund in the hands of the trustees.

HON. MR. JUSTICE LITTLE:

It is scarcely necessary to refer to those well established and recognized principles or rules which are at all times to be strictly observed in expounding a will; but it appears as well to observe that their principal bearing is clearly understood to be "that the court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he *has used*,—*Parke, J., 5 B., Adol., 129*; and that the construction of the will is to be made upon the entire instrument, and not merely upon disjointed parts of it, and consequently all its parts are to be construed with reference to each other,—*Ws. on Errs., 2 p. 1085.*"

On carefully re-perusing the terms of the foregoing bequest, and making considerable reference to adjudicated cases in which the principles of construction under somewhat similar circumstances are applied and expounded, I am inclined to hold that on the death of testator's daughter, Harriet Elizabeth, without issue, a moiety of the £10,000 so bequeathed and directed to be set apart, and held by the executors in trust for the use of the children of the deceased son, is now vested in the guardian plaintiff, and that, since the daughter's death without issue, he is entitled to have the interest or yearly income arising therefrom.

I do not see that any grounds exist to support the contention of the plaintiff for an immediate payment of the principal sum to him, or that the executors should be relieved of their trust in that particular in these proceedings.

Nor do I consider the words and language of the will can reasonably bear any other construction and meaning than that the principle sum should be held by the executors for such uses as named until the death of testator's surviving son. This construction of the present vesting and future payment of this bequest is, I consider, reasonable and just and governed by the dicta given in the decided leading cases on the subject of vested and contingent interests, &c.

"Where a vesting is postponed it may be controlled by a direction to apply the interest for the benefit of the legatee as to postpone payment or possession only, and not the vesting; or if the postponement of division or payment is merely on account of the position of the property, or corpus, or, for instance, there is a prior gift for life, &c., and a direction to pay over or distribute, upon the decease of the legatee, for life the gift in remainder vests at once,"—*Bennett's Trusts, 3 K. & J., 280; Strother vs. Dutton, 10 DeG. & J., 675; Theobald on Wills, 275; 2 Ws. on Errs., p. 1231.*

It will be seen there is nothing inconsistent with the language used and the construction thus applied to this bequest, and that the position is fully warranted by authority.

Amongst the many cases in which the principle of such present vesting has been judicially passed, we may note these of *Wills vs. Wills*, 20 L. R. E., 9 C.; *Malcolm vs. Martin*, 3 Bro., C. C. 50; *Willes vs. Douglas*, 10 Brav.; *Shrimpton vs. Shrimpton*, 31 Brav.; *Davis vs. Fisher*, 5 Bear., p. 208. In the latter case the judgment contains (*inter alia*): "That expressions importing a postponement of the vesting may be so controlled by the expressions and circumstances as to postpone payment only, and not the vesting; and it has been held that a direction to apply the interest or income for the benefit of the legatee, affords evidence of the intention to vest the capital." In this case not alone the income is to be applied to the use of the legatees, but the principal is also directed to be held by the executors for their use.

We again find in the case of *Alt vs. Gregory*, 8 D., McN. & Gr., the distribution of the corpus was postponed until after the death of the last survivor of the persons entitled to the income; but the legacy in the meantime vested. In this case, not alone the income is to be applied to the use of the legatees, but the principal is also directed to be held by the executors for their use. In *Shrimpton vs. Shrimpton* there was a devise to trustees upon trust for testator's daughter for life, and after her death, upon trust to sell and buy and divide the produce thereof between and amongst her children when they should attain twenty-one years, and, in the meantime, the interests to be applied to their maintenance, &c. It was held by the master of the rolls (*inter alia*), "That there was a clear distinction between the gift and the time of payment; that the postponement of the payment does not postpone the vesting where the legacy may be payable at a future time; but the interest is to be applied to a legatee at present, the law regards it as vested," — *Jarmin on Wills*, 815, 3 edn; *Davis vs. Fisher*, 5 Bear.

The particulars or details of other cases of a similar character and dicta might be given; but I consider it sufficiently clear to warrant a pronouncement such as that arrived at. Although there is an apparent want of clearness and definiteness in the language of the bequest, and an unnecessary repetition in one particular, still the intention of the testator is manifest and the meaning of the language clearly ascertainable.

The testator directed and willed that his executors should

hold the corpus or principal sum of £10,000 to the use of his sons, share and share alike, for life, and, upon the decease of either, then one-half thereof to the use of the children of such deceased son, and the other half to the use of the survivor, and on the death of the latter, then the whole to be held for the use of the children of his sons, share and share alike, &c., &c.

The sons, therefore, held equally as tenants in common, and the child of the deceased son, Arthur, not alone by force of that legal construction which must be applied to his rights, but by the clear and distinct language of the testator, is left and becomes entitled to one-half of the corpus; that principal sum is well ascertained, it is fixed, certain and completely separated from the rest of testator's estate, and is held by the executors in trust for his use, until the period for payment over shall arrive.

This trust and duty imposed on the executors must continue, and they are warranted in retaining the principal amount of such moiety until the death of the surviving son.

In re Grey's Settlements, V. 35, W. Rr.

It is now contended that on the happening of this event the whole corpus of the fund is to go in equal distribution, or *per capita*, amongst the children of testator's sons. It is also further contended by the defendant's counsel, that this application for an adjudication at present tends to affect interests of parties not in *esse*, and consequently is unwarranted.

I fail to see, under the state of existing facts at present submitted for consideration, that anything authorizes or justifies one in determining that it was the intention of the testator to alter, cut down or lessen the interest of either of his sons in the corpus so bequeathed by him to them. We must not forget the source from which the £8,000, part of the £10,000, is derived, viz: it is to be paid out of the residuary portion, or part of testator's estate, by his sons, John and Arthur; they are equally to bear the responsibility and charge of paying over, by annual instalments out of that residue so bequeathed to them, this amount to create a fund to be set apart for the use of their sister and her children, and, on her death without children, such fund was very properly to be preserved for them equally; and on the death of either, then his share or half part was to be held by the executors for the use of his child or children. Nothing could be more equitable and just; no one can question the impartiality exhibited in the appropriation or distribution of such a fund so created. But it is now suggested

that not only is there no such vesting of the one-half or moiety, but that on the death of the present infant claimant his share would pass from his personal representatives to the surviving son, and on the death of the surviving son, leaving children the claimant would receive, not what his father was bequeathed nor the interest bequeathed to and enjoyed and used by him, but merely such part of the £10,000 as might be allotted to him as one of possibly several claimants.

Whatever may be the future status, the present condition of this case would not lead one to concur in upholding such a construction. The words "after the decease of the survivor of my sons, then the whole to the use of the children of my sons, share and share alike," to which such importance is attached, cannot and should not be taken and construed disjointedly, but must be read and construed with regard to the context, and then it will be found that perfect consistency is preserved by testator throughout the whole of that portion of his will now in question. They are clearly relative, and, without anticipating events or disputes, it might be fairly considered that the interests already vested by the specific language used in the will are not by these latter words divested and a new interest created.

Giving due regard and attention to the claims of the parties interests, it is apparent that the objection made by counsel of the inopportuness of any final adjudication on the whole of the matters involved in the consideration of this case, is put forward with some force of authority.

The ultimate and final distribution of the whole fund in the manner and under the circumstances contended for by counsel for the surviving son; that is, on his death leaving children, and a distribution of the whole fund, *per capita*, amongst such children and the child of Arthur, might point to interests now unrepresented, and which may then possibly exist, and covers a right that may be then disputed. As bearing on such a position we find in the case of *Bright vs. Tindall*, 4 L. R. C. D., upon a special case to obtain a decision whether persons not in *esse* would be entitled under certain circumstances which might not arise, to share in property, the court declined to decide the question, being of opinion that it would be injurious to the parties to have the decision until the events should happen which would give rise to the question. Again, in *Garrick vs. Lawson*, 10 Hare's Reports, the court refused to make a declaratory decree upon a special case on the life time of the tenant

for life, with regard to the interests of the parties entitled in reversion.

Whatever may be the result of future dispute or question, anticipated from the happening of any contingency, the interests of the present parties, and particularly those of the infant claimant, cannot in the meantime be affected, and, therefore, it does not appear to be imperatively necessary to definitively adjudicate on the effect of the construction contended for by the counsel for the surviving son on this last point.

I am, therefore, of opinion the guardian of the estate of the infant son of Arthur is entitled to the income of the moiety of £10,000 so bequeathed to the executors in trust, and held for his use.

I consider this moiety a vested legacy payable at a future period of time, and, in the meantime, subject to all the legal incidents of such an interest or estate.

I do not consider this court would be justified in interfering with the executors in their right and control of the corpus of said moiety at present.

Mr. G. H. Emerson, jr., for the guardian.

Sir W. V. Whiteway, Q. C., for the trustees and others.

IN RE ESTATE JOHN BOONE.

1887, *April*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Insolvency—Intestate estate—Equitable mortgage—Preferential claim—Registration.

It appeared that amongst the assets of the insolvent estate of the intestate was a mortgage, which had been pledged in the nature of an equitable mortgage, for a loan of a less sum than its value. The only writing was a receipt of the amount advanced, and this memorandum was not registered. The holder claimed the mortgage as security for amount advanced, and interest thereon. On a petition by the trustees of the intestate estate, for direction of the court—

Held—That the Registry Act is intended to meet the case of a declaration of insolvency of living debtors, and not estates of deceased persons, and that the holder was entitled to the mortgage as security for his debt.

It appeared that Mr Boone died in November, 1884, intestate, at St. John's, and his estate having been represented to this court by the petitioners, creditors, to be insufficient to pay and satisfy his just debts, the petitioners, in the absence of an

executor or administrator, were appointed trustees to collect and distribute the estate and effects of the said John H. Boone, according to the provisions of section 36, chapter 90, of the con. stat., subject to the orders and control of the court or a judge. In the year 1880 the deceased advanced to certain parties named in the petition the sum of eight hundred dollars upon the security of a mortgage deed of lands in St. John's, and in January, 1884, in consideration of an advance or loan to him by Mr. James Baird of six hundred dollars, he deposited the said mortgage deed with Baird as security for the repayment with interest. Accompanying said deed is a memorandum in the writing of the said deceased, as follows:

"Received from James Baird, Esq., one hundred and fifty pounds, cy., payable with interest at ten per cent. on or before the first day of September next.

Jan. 6, 1882.

J. H. BOONE."

"Deed deposited with Mr. Baird as security
for the same this day.

J. H. BOONE."

This memorandum was deposited for registration on the 2nd July, 1885. No part of this advance or interest thereon has been paid, and Baird claims that he is entitled to hold the interest of the deceased in the said deposited mortgage deed as security for the amount and interest thereon aforesaid, and the petitioners asked for the advice and direction of the court in the premises. The section under which the trustees were appointed provides for the collection and distribution of the estate and effects in this island of persons who shall die therein or elsewhere, and the same shall not be sufficient to pay and satisfy the just debts of such deceased person. Upon the adoption of certain proceedings—as was done in this estate—"the supreme court or a judge may authorize the executor or administrator of the deceased, or if they shall see cause, any trustee or trustees whom they may appoint, to collect and to distribute the estate and effects amongst his creditors according to the manner of distribution by law directed to be made in respect to the estates of persons *declared* insolvent, subject in all cases to the provisions of this chapter (90). Provided that nothing herein contained shall be construed to affect the right of any creditor of such deceased person to recover the full amount of such debts as may have been *bona fide* secured in the lifetime of such deceased person by mortgage or other legal conveyance

of any portion of the estate or effects of such deceased person, and not void under the foregoing provisions of this chapter; and also that the like course shall be pursued with the estate and effects of any person dying insolvent, where no executor or administrator thereof has been appointed or resides in this island, on the application of any creditor to the said court or any judge thereof, who may appoint trustees or receivers of such estates and effects, to realize and distribute the same as aforesaid, subject to the orders and control of the court or judge."

At the hearing the trustees were permitted to amend their petition. and, through counsel, to contest the claim on the grounds that the 10th section of the Registration of Deeds Act, chap. 36, Consolidated Statutes, enacts that all deeds, conveyances, or other assurances affecting any lands or tenements in this colony made after the 27th March, 1862, and not duly proved and registered, and every mortgage by deposit of deeds without writing, shall be adjudged fraudulent and void, both at law and in equity, against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed, conveyance, or mortgage of such lands, &c., *or against any trustee under subsequent insolvency*; that there was no registration of the memorandum until after the appointment of trustees; that Baird, under chapter 90, could rank only as an ordinary creditor, the trustees being bound to distribute in the same manner prescribed by law in respect of the estates of persons *declared* insolvent, and that the claim of Baird was not special or preferential. On the other hand, it was contended there was no *declaration* of insolvency in this estate, no executor or administrator to apply therefor; that the term insolvency was not tantamount to a declaration thereof, as was apparently contemplated by the words of the said 36th section; that, besides this, the proviso to that section was sufficient to sustain the claim, and there was a valid equitable mortgage which can be availed of as security for the loan and interest. By the *Imperial Act 5, Geo. 4, cap 67*, there was a section substantially the same as the said 36th, the proviso to which saved the right of any *having a judgment or special security*.

If the question in this case alone rested on the construction to be placed on the section of the Registration of Deeds Act referred to, I am inclined to think the non-registration of the writing made and signed by the deceased, accompanying the deposit of the mortgage deed before the appointment of trustees,

would have been fatal to the claim as preferred, but having regard to the words of the proviso to the 36th section and the legal effect of that in a statute, it appears to me I have only to be satisfied that the debt due Baird was *bona fide* secured in the lifetime of the deceased by a security of the character before mentioned. There does not appear to be any real distinction between a saving clause and a proviso,—*Maxwell on Statutes*, 301. Each of them is, as Bayley, J., says of the latter, "Something engrafted on a preceding enactment,"—*R. vs. Taunton, St. James, 9 B. & C., at p. 836*. Each is merely an exception of a special thing out of the general things mentioned in the statute. It is of great importance and is always to be construed with reference to the preceding parts of the clause to which it is appended,—*Maxwell*, 302, and cases in notes. It is true there is no formal deed of mortgage or conveyance, but besides mortgages so made there are equitable mortgages created either by a written instrument or by a deposit of deeds with or without writing,—*Russell vs. Russell*, 1, *Lead. Cas. in Equity*, 2 *Ed.* 541, *et seq.* Any written agreement or directions or other instrument in writing shewing that it was the intention of the debtor thereby to make his land or other property a security for the debt, will be equivalent in equity to an actual mortgage deed or to a pledge,—*Smith's Equity*, 13 *Ed.*, 370.

The mortgagors to the deceased are not now before the court, and we know nothing of the equities between the parties to the deposited deed; but whatever the interest of the mortgagee the deceased may have been enures, in my opinion, to the benefit of Baird, so far as his claim extends under the aforesaid security, and that he is entitled to the judgment of this court in his favour. From the nature of the claim and circumstances, I think it equitable that each party should bear his own costs.

HON. MR. JUSTICE PINSENT:

The deceased intestate held a mortgage for £200 upon property of one Oke.

About a year before his death he deposited the mortgage from Oke with James Baird, endorsing it as being so deposited as security for a loan of £150, with interest.

Baird did not in the lifetime of Boone register any deposit note or assignment from him of that mortgage, nor did he do

so until after trustees, such as are hereinafter described, were appointed to collect and distribute the estate of the deceased.

There is no dispute about the consideration, nor is there any question raised as to the sufficiency of the security as an equitable assignment, save for the provisions of the registry and insolvency laws.

The latter are contained in chap. 90, Consolidated Statutes.

With regard to the insolvency of debtors in general, the 12th section of that chapter provides that the court may make an order, which shall be published in the *Royal Gazette* and one other newspaper, *vesting the estate* of the debtor in a trustee or trustees.

With reference to the estates of deceased debtors, the 36th section of that chapter makes substantive provision to this effect; that where their estates shall not be sufficient *to satisfy all their just debts*, then, upon the petition of an executor, administrator or a creditor, the court may authorize the executor or administrator, or a trustee whom it may appoint, *to collect and to distribute* the estate according to the manner of distribution directed in respect of estates of persons declared insolvent, *subject in all cases to the provisions of this chapter (90)*; and the section (36) provides that nothing herein, that is, in the 36th section, shall be construed to affect the right of any creditor to recover the full amount of such debts *as may have been bona fide secured in the lifetime of deceased* by mortgage or other legal conveyance of any portion of the estate and effects, *and not void under the foregoing provisions of this chapter (90)*.

The foregoing provisions of the chapter only, in this respect, touch certain fraudulent and preferential assignments.

It will be perfectly clear then, that if the case stood here, there would be no doubt whatever of the right of Mr. James Baird to enforce his equitable mortgage, so far as his security would go.

But the trustees, before mentioned, contend that the security is void as against the estate of the deceased, and that Baird is only entitled to rank as an ordinary creditor; and for this position they rely upon section 10, chapter 36, of the con. stat., providing for the registration of deeds, which enacts that all deeds, conveyances or other assurances, not duly registered and proved, and every mortgage by deposit of deeds without writing, shall be adjudged fraudulent and void, both at law and in equity, against any subsequent purchaser or mortgagee for valu-

able consideration who shall first register his deed, *or against any trustee under subsequent insolvency.*

There is a provision very similar to this under the Judicature Act, 5 Geo. 4, which contained the former law respecting insolvencies, except that that statute gave a judgment creditor as well as otherwise secured creditors a preferential right.

It is an extraordinary fact that never throughout this great length of time has, so far as I am aware, the question now raised been brought before the court for adjudication.

My impression was at first adverse to the claim of the holder of the security in this case, but upon a more careful inspection of the acts, I have arrived at a different conclusion.

I think the provisions of the statute applying to the distribution of the estates of deceased persons as very different in their bearing from those which apply to proceedings relating to the declaration of insolvency of debtors in their lifetime.

In this latter case a change of property takes place, on the instant that trustees are appointed. The estate and effects vest in them, and the vesting order has to be published. Moreover, the debtor has to appear, a further investigation takes place, followed by adjudication of insolvency or not, as the case may be.

In the case of estates of deceased persons, there is no such vesting order, the title remains in the legal representatives of the estate, the trustee is in the nature of a receiver, and the whole proceeding amounts simply to a direction of the court obtained upon *ex parte* and unpublished petition to distribute rateably amongst the common creditors, reserving the right of secured creditors. It appears to me to make no difference in effect whether this is done by the executor or administrator, under directions, or by this kind of trustee, appointed to carry out such directions.

I think the Registry Act contemplates a rivalry in title, and is intended only to meet the case of a declaration of insolvency of living debtors; that it has no application to the 36th section of chapter 90; and further, that the express words of the latter, "not void under the foregoing provisions of this chapter," put such a case as this out of the operation of the Registry Acts.

If this be not intended, it is easy for the legislature to correct it. Another somewhat curious point was raised in aid of the claim made here, viz.: that such a case as the present does not in any event come within the operation of the Registry Act, as the only kind of mortgage by deposit provided against

is one "without writing," whereas this one is in writing. I think, while it is desirable that in revising the statutes, there should be a clearer definition on this point, a deposit with writing would be included in the term "other assurance" in the preceding part of the section.

My judgment is that the plaintiff has sustained his claim to the benefit of his security, but that regarding the laxity of the business and the novelty of the point raised, the judgment should be without costs.

HON. MR. JUSTICE LITTLE:

I fully concur in the conclusion arrived at in the judgment pronounced by my brother judges on the question raised in the special case submitted in this matter.

There is no dispute whatever about the facts and the *bona fides* of the transaction are also admitted. The trustees rest their contention solely on the non-registration of the memorandum referred to. Mr. Boone was, substantially, mortgagee of certain lands situate in St. John's, and, on the 6th day of January, 1882, deposited his deed of mortgage with Mr. Baird as security for a loan of £150 currency, then made to him by the latter. A memorandum, written and signed by Mr. Boone, acknowledging the receipt of the amount, naming the rate of interest and fact of deposit, and bearing the date as stated, was attached to the deed so deposited.

This memorandum, with the deed, so remained in the hands of Mr. Baird until the month of July, 1885, when it was registered. Mr. Boone died intestate in the year 1884, and it being found that the assets of his estate were insufficient to meet the claims of his creditors, the trustees were appointed by this court to collect and distribute his estate and effects amongst his creditors. This appointment was made by virtue and in pursuance of the provisions and terms of the 36th section of chapter 90, of our consolidated statutes. This section directs that such collection and distribution shall be made according to the manner of distribution by law directed to be made in respect to the estates of persons declared insolvent, subject in all cases to the *provisions* of this chapter. It also specifically provides that nothing therein contained shall be construed to affect the right of any creditor of such deceased person to recover the full amount of such debts as may have been *bona fide* secured in the lifetime of such deceased person

by mortgage or other legal conveyance, of any portion of the estate or effects of such deceased persons, and not void under the foregoing provisions of *this chapter*, &c.

Now, no contention does or could exist as to the legality of the conveyance so made by the deceased by this deposit accompanying memorandum, and, under the circumstances, admitted by counsel.

Its legality thus being admitted, the trustees confine their opposition or objection, as stated by their counsel, to the grounds of the non-registration of that memorandum before the date of their appointment as such trustees, and that, as the estate and effects of deceased vested in them, the absence of registration at that time was fatal to Baird's claim as equitable mortgagee, and reduced him to the position of an ordinary unsecured creditor. In support of this position they rely on the provisions of the 10th section, title 9, cap. 36, entitled "Of Registration Deeds," consolidated statutes, which provides that "all deeds, &c., affecting any lands or tenements in this colony, made after 27th day March, 1862, and not duly proved and registered, and every mortgage by deposit of deeds, without writing, shall be adjudged fraudulent and void, both at law and in equity, against any subsequent purchaser or mortgagee for valuable consideration, who shall first register his deed, &c., of such lands, &c., or against any trustee under subsequent insolvency."

It is, therefore, clearly apparent that these clauses or sections of the two Acts referred to are in direct conflict and repugnant to each other. Under the section of the Registration Act the trustees here contend registration of this memorandum is indispensable to its legalization. But the provisions, as quoted from the 36th section of the Insolvency Act, under which they were appointed and by which they are governed in their distribution of the assets of this estate, positively and unqualifiedly declares that nothing in that Act or chapter contained shall affect the right of any creditor of such deceased person to recover the full amount of such debts secured by mortgage or other legal conveyance, * * not void under the foregoing provisions of that chapter. There is nothing to affect or avoid this conveyance in any part of that chapter, it is admittedly legal and valid in all respects, but on the one alleged ground, that is, the want of registration.

The only question then to determine is, which Act shall prevail or which should govern in the strict legal application of

their provisions to the respective contentions of the parties in the case. The words in the proviso to section 36, of chap. 90, do not conflict in any way with the enacting clauses thereof, and no exception has been or could be taken to the scope and effect of its provisions because of their being set out in the proviso.

If these two provisions or enactments were in the same statute, and so conflicted in their terms, the rule governing their construction would be that given in *Hardle*, p 109:— "Whenever there is a particular enactment and a general enactment in the same statute * * and the latter taken in its most comprehensive sense, would override the former."

Such being the rule in such cases, we might be justified in applying it with great force to such a case as this. Here the conflict exists in the language of sections of two separate statutes as applied to a question which, it is contended, is within the pervue of both statutes. If so, the terms of the particular enactment, that is, the provisions of the 36th section of chapter 90 should prevail against the general terms of the Act of registration.

However opposed and conflicting in terms these Acts may be, it is clear the rights in question and contentions here raised are alone to be determined by the provisions of the particular chapter of the statutes from which they emanated and by which they are governed.

This claim, admttedly, has been *bona fide* secured in the lifetime of the deceased by a legal conveyance, and that conveyance has not been shown to be void under any of the provisions of chapter 90, and in accordance therefore with the very words of the proviso of the section referred to in that chapter: "the right of the creditor under such circumstances shall not be affected."

I consider, therefore, no legal grounds exist for the contention of the trustees that the equitable assignment of the mortgage in question should be declared invalid by reason of its want of registration, as set out on the record in the case submitted.

Mr. McNely, Q. C., for Mr. Baird.

Mr. Milley, for trustees.

1887, June. HON. MR JUSTICE LITTLE.

Landlord and tenant—Lease—Covenant—Payment of rent—Breach—Demand—Distress—Re-entry—Assignment by Lessor—Forfeiture.

In an action of ejectment under a lease containing a covenant to re-enter, it appeared that the tenant was in arrears of rent to a considerable amount, for which repeated demands had been made, and that there was not sufficient property on the premises to distrain. The defence set up was insufficiency of notice and demand, and that no distraint had been made.

Held—That the lessor is not bound to make a formal demand, but merely an effectual demand; that proof of insufficiency of distress removes the obligation to distrain.

THIS is an action of ejectment in which the writ was issued on the 6th of November, 1886, and defendant appeared thereto in May last. The cause was heard before the court without a jury. R. H. Prowse, one of the plaintiffs, was the only witness examined, and from his evidence it would appear that defendant on the 12th day of January, 1853, entered into and executed a lease from the following named parties, owners of the lands and property of the estate of one Kean, deceased, Catharine O'Brien, Arabella Brett, Ann Tyndall, Matthew W. Walbank, Susan A. Walbank, Edward B. Tuson, and Samuel Seddon Walbank. The interests of these lessors, from the documentary evidence supplied by the plaintiffs, appear now to be vested in and solely represented by the present plaintiff.

The property so leased is situate at Harbor Grace, and was to be held by the lessee for the term of forty years from the 20th of May, 1853, and at a yearly rent of thirty pounds, payable half yearly. The lease contains the usual covenants, and *inter alia* expressly provides "that if the said rent or any part thereof shall be in arrear or unpaid by the space of thirty days next over or after the day or days whereon the same ought to be paid, &c., being lawfully demanded upon or at any time after the expiration of the said thirty days, and not paid when demanded, and there being on the said premises no sufficient distress to countervail the amount of rent then due, then, from thenceforth, and at all times thereafter, it shall and may be lawful to and for the said lessors, &c., into and upon the said demised premises, to re-enter and the same to have again, retain, repossess, and enjoy, &c."

It further appeared that defendant continues in possession of the land, &c., so leased, and paid the rent so reserved, at different times, but has for some time allowed it to be unpaid

and run in arrear, and the amount now sworn to as due for such arrears is four hundred and twenty-eight pounds (\$1,712).

The witness deposed to repeated demands having been made for the payment of the rents, and of bills furnished defendant periodically, with no satisfactory result, and finally a demand and notice was given him by letter on the 2nd day of November, 1886, by the attorneys for the plaintiffs, followed up by the writ and these proceedings at law. Prowse further deposed "that he, with one Makinson, had made an examination of the erections and buildings on the lands so leased to defendant, and that there was nothing there worth distraining on, and if the property were sold to-morrow he would be unable to get the rent out of it." It also appeared that the interest of the late Catherine O'Brien in Kean's estate, since this action was brought, has been assigned by the executor in England to one Tyndall, but that Prowse, as such administrator, has been no party to such transfer.

The plaintiffs also produced in evidence the notice or demand from plaintiffs' attorneys and defendant's answer thereto, the title deeds showing the dissolution of the interests of the parties, the letters of administration in the several estates as well as the record of proceedings in an action on the same lease for rent or arrears of rent due in 1860, tried at Harbor Grace before the circuit court that year, resulting in a verdict for the lessors for the amount then alleged to be due and in defining certain metes and bounds of the property so held by the defendant.

The defendant was not examined nor was there any evidence offered on his behalf or any defence made to the action other than a motion for a non-suit on the grounds (1), of the insufficiency of the notice of demand for rent; (2), no distress having been made on the property and that the plaintiffs were not the owners.

From a review of the evidence, oral and documentary, and a reference to the authorities, having application to the points moved on, and particularly regarding the terms of that part of the 105th section of our Pleading and Practice Act, governing these proceedings, I am clearly of the opinion that the plaintiffs have sustained their claim for a judgment in this action.

The results consequent on default in payment of the rents reserved and the rights arising to the plaintiffs therefrom are clearly ascertainable from the language of that express covenant so set out on their lease. It is in no way ambiguous, and although, as a rule, such a covenant must be taken most strictly

against the covenant, still the fair and obvious meaning of its terms, and the circumstances relating to the past and present proceeding in relation to it, relieve one of the difficulty in determining on the rights of these parties.

The section of our act referred to is virtually a transcript of certain provisions of the 4 Geo. 2, cap. 28, which became law for the purpose of remedying the inconveniences heretofore attending the enforcement of lessors' or landlords' rights at common law under such circumstances as these. The words of the 105th section of our act are that in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear and the lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such lessor may, without any formal demand or re-entry, serve a writ of ejectment for the recovery of the demised premises, which service of such writ in ejectment shall stand in the place and stead of a demand and re-entry; and if it be proved on the trial, in case defendant appears, that half a year's rent was due before service of the writ, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had the right to re-enter, then the lessor shall recover judgment as if the rent in arrear had been legally demanded and re-entry made, &c.

These provisions may be regarded as sufficient to relieve the lessor from making the formal demand contended for because of the terms of his covenant, and we find in the case of *Doed Schofield against Alexander*, 2 M. & S., p. 528, where like obligations existed on the part of the lessor, that such a demand stipulated for in a lease did not now mean demanded with all the strictness of the common law, but merely an "effectual demand."

Similar principles and constructions of the law are laid down in *Doed, Earl of Shrewsbury vs. Wilson*, 5 B. & A., 384, 394; *1 Wms. Land*, 287; *Platt on Leases*, and *Cole on Ejec.*, 417.

And also, that it is no objection in such a proceeding under the Act that more than a half year's rent is due, and that no sufficient distress exists on the premises countervailing such arrears,—see *Cross vs. Jordan*, 8 E. 149, overruling *Doed Powell*, 9 Dougl., 548.

We also find that clear proof must be obtained as to the insufficiency of the distress to satisfy the amount of arrears,—*Hanson v. Franks*, 2 C. & K. 678; *Woodfalls, L. & T.*, 12 Ed., p. 294.

Therefore the contention of counsel for a non-suit on the ground of insufficiency of notice of demand for the rent and the want of distress, or the absence of proof of insufficiency of distress, are obviously untenable from the evidence given by Mr. Prowse, the written notice, the other documentary evidence of record, and the application to these facts of the terms and provisions of the section of the Act under which the proceedings are instituted. The rulings of the judges in analagous cases will be found opposed to the conclusions contended for by the defendant. As to the last exception or ground moved on, namely, the assignment by the executor of Brien in England of the interest referred to, in my opinion, it does not at present affect the rights acquired by the administrator and now possessed by him in and over that interest his testatrix had in lands or property in this island. By virtue of his appointment as administrator C. T. A. of her estate by the Supreme Court of this island, he was entitled to sue in this cause, and being no party, as he has sworn, to any proceedings abroad to create any change in his status or rights, I am unable to see any force in the point urged in this particular.

Furthermore, it would appear such an exception would not avail the defendant, even under the circumstances contended for, as by 83rd section of our Pleading and Practice Act it is provided, that where the title of the claimant shall appear to have existed, as alleged in the writ, at the time of service, and shall also appear to have expired before the trial, he shall, notwithstanding, be entitled to judgment, &c. I am satisfied that the plaintiffs are legally clothed with all the rights necessary to enable them to sue as plaintiffs in this action, and, therefore, that they represent and stand towards the lessee in the place and stead of the lessors parties to the lease in question.

Much as one may be inclined to lean against forfeitures of this nature, still I cannot discover in the circumstances surrounding this case such grounds as would warrant or enable me to arrive at any other conclusion than that already mentioned. I must, therefore, sign judgment for the plaintiffs.

1887, *November*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Partnership—Parol agreement—Breach—Statute of Frauds—Part performance—Statute of Limitations.

It appeared that in the year 1876 the plaintiff, being a mineral prospector, entered into a parol agreement with defendants that in consideration of his and defendant (Henderson) imparting to the defendant (Cleary) certain information relative to mining locations, the latter was to take out, at his own expense, licenses for the same, and the three were then to be conjointly interested to the extent of one-third each; that applications for licenses for said lands were made in said year by said Cleary, and in 1878 refused by the Governor in Council. Of this decision the plaintiff and Henderson were informed. Nothing appears to have afterwards transpired relative to the said agreement. In 1878 Cleary, on his own account and in his own name, applied for and was granted in 1881, a license for one of the locations applied for in 1876. This property was sold by Cleary for \$13,000, and a suit taken by the plaintiff for a decree for specific performance. The defendant (Cleary) denied the agreement, and pleaded the Statute of Frauds, *i. e.*, no agreement in writing, and the Statute of Limitations.

Held—(Pinsent, J., differing)—That the parties were distinctly at issue as to what the contract was, and the object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties had failed to make distinct by reducing into writing; that the act of part performance relied on must be unequivocally referable to the agreement as that alleged; this element, which is necessary to take agreement out of the Statute, was absent; that the license of 1881 was not the outcome of the application of 1876, nor was the lease to Cleary the result of the same.

THE claim of the plaintiff, as set out in his petition filed January last, 1887, arises from an alleged agreement made between him and the defendants in 1876, whereby the plaintiff and the defendant (Henderson), who had been prospecting for mines, were to inform the defendant (Cleary) what lands to secure with a view to profitable working or sale, and for such information Cleary was to pay all expenses for securing mineral lands, and the three were each to have and possess a third interest in the lands so taken; that upon information then given by the plaintiff to the defendant Cleary, he applied for two licenses to search for minerals, one on Pilley's Island and the other near Badger Bay, in Notre Dame Bay; that in 1881 a license to search for the land applied for in 1876, situate in S. W. part of Pilley's Island, was issued to Cleary, a lease of which was granted to him in 1885, and that in the same year he sold for a large amount the said last-mentioned property and has refused to render plaintiff his proportion of the amount thus realized, which he claimed to be one-third, and prayed that

the defendant Cleary may be decreed to pay, or such amount as should be found due to him on accounting. The defendant (Henderson), by his answer, does not admit or traverse the statements in the petition, but submitted himself to the judgment of the court after the hearing of the case; and the defendant (Cleary), by his answer, denied the making or entering into the alleged agreement with the other parties. In the year 1876 he made a verbal agreement with Henderson in relation to searching for minerals and applying for a license therefor, Henderson representing himself as the agent of the plaintiff, both of whom were desirous of making application for a license to search in certain lands and obtaining assistance from him towards that object. He agreed to apply for a license in his own name, to pay the Government fee thereon, and to assign over the license (if granted) to them upon their returning to him the amount advanced. To avoid unnecessary repetition, whatever was transacted after that between the parties, or with reference to the land, will appear in the extracts from the evidence hereinafter set out; the defendant (Cleary) also relied in his defence on the Statutes of Frauds and Limitations. The parties, Mr. Anderson, manager of Pelley's Island mine, and Mr. Long, chief clerk in the Surveyor General's office, were all the witnesses examined, the substantial parts of whose evidence I shall as briefly as I can fairly give.

The plaintiff says that in May, 1876, Henderson told him he had arranged with Cleary to take out two licences to search for minerals; "I was to have a third interest in any two I should name for them to take out. On asking for an agreement, Henderson said he was then engaged, but as soon as convenient I should get one and that Cleary would pay the license fee. I then gave him the information and recommended the best places, the S. W. end of Pelley's Island, leading eastward to a grant held by Goodfellow & Co., the other was in Badger Bay. I had a conversation with Cleary on the 6th June, 1876, when he said that he had applied for the two places and paid the licence money for those mentioned by Henderson. On asking for a written agreement, he said Henderson was the proper person to make it. I told him that I was to have one-third interest in the two mining licences that he and Henderson should apply for; he said that he was willing to abide by Henderson's arrangement with me. I asked him to give a note to that effect, which he did, dated June 6th, 1876, produced thus:

"Whatever arrangement you (plaintiff) have made with Mr. Henderson (defendant) I am quite satisfied to abide by.

(Signed), PHILIP CLEARY."

He also gave me the receipt for the license fees (£11 10s. 10d.) for the two licenses paid Surveyor General May 29, 1876. I gave them information that those lands contained minerals, and I had more practical experience in prospecting in Green Bay than in any other part of the Island."

Mr. Henderson testifies to a verbal arrangement between him and Cleary, with reference to the application for the licenses mentioned, specimens of the mineral character of the localities he had seen with plaintiff. The arrangement with Cleary was that he should take out the licenses in his own name, he paying for them, and that he (plaintiff), and myself, should each hold a third interest; this had to receive plaintiff's assent. I undertook to examine the ground and get the best information about it. Plaintiff assented to proposed arrangement and furnished me with a description of the locality, as before stated, which I gave to Cleary. The application for the licenses was to be made forthwith, and I understood they were so made. It was only understood generally we were to hold each one-third interest—there was no definite arrangement as to the mode of conveying to each his interest. When I told Cleary of plaintiff's applications to me to get something definite in writing, he said the arrangement was understood between him and me, and he was prepared to carry it out. Cleary told me in 1878 he could not get the license for Pelley's Island on account of the inclusion of the land in a Government reserve, of which I told plaintiff. From that time (1878) we had no further transactions in relation to that property. I accepted Cleary's statement, and took no further interest in the matter. Guzman and I sunk shafts on this and adjoining property of Goodfellow's, 1879 or 1880, perhaps further on. I understood Pelley's Island was free for us to examine, and what we did was without reference to Cleary or plaintiff. There was an arrangement between Guzman and me in relation to Pelley's Island, if it turned out to be good. This, I understood, was a Government reserve, and would be sold as such. Under the arrangement with plaintiff and Cleary there was no actual dealing with the property between ourselves or with any third parties."

The defendant (Cleary) deposes: "I never made the agreement alleged with the plaintiff, or any such, and never authorized anyone to do so on *my* behalf, and never before these

proceedings was I aware it was alleged I had made such an agreement. I never had any transactions directly with the plaintiff with reference to the subject of this suit, nor with any other matter. In May, 1876, I had just arrived in St. John's from Montreal, when Henderson called at my office and asked me to take out two licenses to search for minerals. At first, I believe, he only named himself; he gave me diagrams of the places at Pelley's Island and Badger Bay. I agreed to take out the licenses in my own name and transfer them to him on his repaying me the fees. I did not know the plaintiff then, nor was his name mentioned, if it had been I would not have gone into the matter. The arrangement sworn to by Henderson in his evidence is entirely untrue. I obtained and paid for the licenses on the following day in my own name; no information was given to me as to the appearance of minerals in the lands licensed me. The first time I met plaintiff was on board a steamer on the way to Green Bay, in June following; he told me it was he who gave Henderson the information about Pelley's Island and Badger Bay. I must have told him the arrangement I made with Henderson. I gave Tilley the memorandum A.; but before that it is not true he told me of his arrangement with Henderson, viz.: "that he was to have one-third interest in the two licenses," nor had I any intimation or information that he and Henderson had any joint interest in the licenses. I did not see Henderson until the following year, when I asked him for the license fees I had paid. For over two years I had no transactions in any way with either of these parties respecting the mineral lands, nor anything to do with them, or to receive any information respecting them; there was some objection to the granting of the Pelley Island license. About two and a half years afterwards I applied for it on my own account. After I got the license in 1881 I searched for minerals and found nothing, nor, to my knowledge, has any been discovered there. In 1878 I applied for and received a license over Linfield's Island, Salt Pond, with adjacent islands. On that I spent about \$500, and a mine is now being worked there, as shown on the plan D. Henderson and Guzman were at work at Salt Pond and removed from it on my showing a license. Got a lease, in 1885, of a mile out of the licenses of 1881; this is valueless, save as an adjunct to the Salt Pond or Linfield mine. Since Henderson was informed of the refusal to grant the license in 1876, I have not had any notice or intimation of any claim by him or plaintiff respecting Pelley's Island until in

December last, 1836, when I was shewn the memorandum A, nothing was ever spoken of a partnership in this transaction. Henderson told me there was mineral at the points A. and B, on the S. W. part of the plan. I told plaintiff on board the steamer it did not matter to me what arrangement he made with Henderson so long as I got my fees. I sold both properties to the same parties in 1885."

Mr. Long explains the applications and proceedings from the records in the Surveyor General's office. It appears that when the 1876 application was made Pelley's Island was supposed to contain six miles, and two licenses to search had been issued for it to Goodfellow and others; it was afterwards, on a correct survey, found to contain twelve miles, and in 1881, on Cleary's second application, a license was granted to him, from which, in 1885, the square mile was selected and granted. The Salt Pond property, although adjoining, is distinct from that, and as regards both, to give title and save forfeiture, are subject to certain statutable conditions, more particularly in requiring large expenditures in the workings within specified periods. Both properties subject to these were sold to the same parties by Cleary in 1885 for \$13,000.

For the plaintiff, it was in an able argument committed to writing and submitted to the court, contended by Mr. Davis that the Statute of Frauds did not affect the plaintiff's claim, as under the memorandum in writing there was a part performance of the contract in the disclosing or giving the information of where the mineral properties were to be found and assisting in prospecting at the locality. Having regard to the terms of the 4th section of the statute and cases decided under it, and which apply to this case, there was clearly no sufficient compliance with its requisites to enable a court of equity to compel specific performance if the lands were still held by Cleary, and the same principle would, as I regard it, extend to the consideration money on a sale, as was made by him. As to acts of performance to take the case out of the operation of the statute, they should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement, (I add, though informal), of which they were a part execution,—*Sneles, eq. 268*. What is relied upon is merely preparatory or ancillary to the alleged agreement, and such cannot be regarded as part performance,—*Fry, 269*. This is well illustrated by the case of *O'Reilly vs Thompson, 2 Cox, 271*, where it was a condition of a parol agreement

for the assignment of an interest in a lease of a house that the plaintiff should obtain a re-lease of a right from a third party, which the plaintiff did obtain by payment of a valuable consideration. It was held to be merely a preparatory act on the part of the plaintiff, and not a part performance of the contract. Mr. Davis also relied upon a partnership between the parties, as in *Dale vs. Hamilton*, which was for the purchasing and selling lands, 5 *Hare*, 381; but I cannot discover a tittle of evidence to establish that any such position was contemplated, not to speak of existing, or even to be gathered by implication, and it certainly is not for the court to substitute itself for the parties and manufacture an agreement on any suggested equitable motions. It will be observed that all the evidence having any bearing on the alleged arrangement is from the parties themselves, each of whom is directly interested in the issue. The defendant Cleary's sworn testimony is certainly quite inconsistent with his answer, in which he states that when Henderson first called upon him he represented himself to be the agent of the plaintiff, with whom he made a verbal agreement to apply for a license in his own name, pay the Government fee thereupon, and to assign over the license, if granted, to *them*, upon their paying to him the amount so advanced; whereas, in his evidence, he says at that time he did not know Tilley (plaintiff) in the matter, nor did Henderson mention his name, if he had mentioned it he would not have gone into the matter; while he distinctly denies ever having made the agreement alleged in the petition, or authorized any person to do so on his behalf, he sets up an entirely different arrangement, and the indefinite memorandum he gave the plaintiff is susceptible of his, Henderson's, or the plaintiff's interpretation of it, according to their varying testimonies. To this discrepancy I have given consideration.

The statute against frauds and perjuries would have been enacted to little purpose if courts of justice were at liberty to supply all the omitted material requisites of an alleged contract on the interested suggestions of either side; but, upon Cleary's own admission of his agency for either or both of the other parties on his first application for the licenses, it may be enquired how far a trust could be supported by analogy to a case in which a person is employed by another to purchase a property for him, and does so in his own name for himself, repudiating the claim of the other,—See *Lees vs. Nuttall*, 1 *Russ and Myl*, 53; *Taylor vs. Salmon*, 4 *Myl and Cr*, 134. If, there-

fore, the defendant Cleary had on the first application received the licenses in his own name, and refused to assign to the others on being tendered the fees paid by him, I am inclined to think he would, on the authority of the cases cited, on a properly framed petition, have been regarded as a trustee for them and compelled to assign to them, and if he had disposed of the property would have to account to them for their interest in the purchase money. But having regard to the fact that the Government declined to grant a license of the land in question, which was made known at the time to the other parties, who did not re-imburse Cleary for his advance, or offer to do so before this proceeding although so requested, as he deposes; also to the apparent withdrawal or abandonment of the plaintiff of the project, and no assistance rendered in the prospecting; also to the independent working in the locality by the defendant Henderson and Guzman on their own account; also to there being no mineral of any value discovered within the prescribed area, although represented by the plaintiff in the first instance that there was at the S W. part of the Island, which is still to a considerable extent unlicensed and ungranted, as will be seen on reference to the plan D.; also to Cleary after a lapse of time having made other applications for the license and lease, and paid the fees thereon in his individual account, and made expenditures without any request, claim or treaty by or with either of the other parties; also, that the whole value of the premises for mining purposes arises from a subsequent discovery by Cleary distinct from that in his first application; and, from all the circumstances, I am of opinion the plaintiff has failed to sustain his claim in law or in equity to any portion of the purchase money aforesaid, and that this action should be dismissed, the question of costs reserved for further consideration.

I regret some arrangement had not been arrived at by the parties, as suggested by the court, and for which ample time was allowed.

HON. MR. JUSTICE PINSENT:

The plaintiff in this case claims to recover from the defendant, the Hon. P. Cleary, (with whom Daniel J. Henderson is joined as co-defendant), one-third of a sum of money (\$13,000) received by him from McNicholl and others as the purchase money of his (Cleary's) right, title and interest in mineral

lands, situate at Pelley's Island, on the north coast of Newfoundland, being Salt Pond and the islets within it, described as being held under a grant, demise, or lease from the Crown, issued in June, A. D. 1881; also, of his (Cleary's) right, title and interest in another square mile of land at Pelley's Island, lying between Salt Pond and the western shore of Pelley's Island, and in an adjoining piece or parcel of land consisting of fifty acres; these two last pieces being described as held under a grant, demise or lease, dated in June, 1885, all these being more particularly delineated and described in plans or diagrams attached to the conveyances from the Crown.

The defendant (Cleary) denies that he entered into the agreement set up by the plaintiff. His case shortly is, that his original concern in the matter was of a purely gratuitous character; that at Henderson's request he was to apply for and procure licenses in his (Cleary's) own name, and assign those licenses to the parties interested when they re-imbursed the fees he may have paid for them; and that it was to such an understanding the note given by him to Tilley referred. That the license for Pelley's Island, for which he so applied on Tilley's information and description, was refused; and the renewed and amended application made in 1878, and upon which he succeeded, was for himself and upon his own account. Moreover, he contends that as there was no agreement in writing setting out the terms specifically, and as the transaction affected an interest in land, any alleged verbal agreement was void under the Statute of Frauds, and imposed no legal obligation upon him. He also sets up that the Statute of Limitations would bar any claim, if ever there was one; and claims further, that by silence and acquiescence the plaintiff had abandoned or forfeited any rights he ever had. He contends that under any circumstances Salt Pond "location" represents the main value of the entire property conveyed by him to McNicholl and others; that the remainder did not prove of any value as a mine, and is only valuable as an incident or adjunct to Salt Pond for the erection and prosecution of works in connection with a mine, and that Salt Pond lot did not form part of anything he obtained under Tilley's information and the application made thereunder; that mineral was not discovered in Salt Pond until January, 1881, at low tide; that, producing his license for this place, he compelled Guzman and Henderson to desist from continuing the sinking of a shaft in Salt Pond in that year. With regard to the third (fifty acre) lot adjoining these, defendant

contends that it has nothing to do with the other places, and arises from a recent provision of the mining laws, by which, under certain circumstances, such lots in fee are issued with mining leases.

In my opinion, the position taken by the defendant (Cleary) that his original connection with the other parties to this suit with reference to the Pelley's Island and Badger Bay mining locations, must be regarded as of the simply disinterested character he now sets up, is utterly untenable, and is wholly inconsistent with his relations to these mining properties and transactions from that time down to the sale to McNicholl and others, and with the note in writing given by defendant to plaintiff in 1876, and is entirely opposed to the weight of other testimony and every reasonable view of the case; but, if this position of the defendant could be sustained, I fail to see how it would improve his case. He would thus, by his own declaration, be trustee for the plaintiff and the co-defendant, and be bound to assign to them, on payment of such fees and expenses as he may have borne, assuming that the property he obtained and sold was in whole or in part that which the plaintiff enabled him to secure.

In my judgment the license of 1881 was clearly the outcome of the application of 1876, which was in part then erroneous in its description and included too much, and was amended with effect in 1878, and the ultimate lease in 1885 of the square mile was its result, and inured in equity for the benefit of all the parties originally concerned and associated, except so far as they may have waived, lost, or abandoned their rights by acquiescence or by conduct inconsistent with their original interests and arrangements. The identity of this property sold by defendant (Cleary) with other mining localities to McNicholl with that at Pelley's Island, of which the information and descriptions were obtained from plaintiff, and which formed the subject of the contract between Cleary, Henderson and Tilley, is, to my mind, fully established, and indeed it does not seem to be questioned.

On the other hand, I am of opinion that, while the information derived from the plaintiff as to Pelley's Island may have drawn the defendant's attention to the Salt Pond mine, of which he afterwards became the proprietor, and which he sold to McNicholl, it only led up, for the purposes of this suit, to a claim confined to the area capable of being included in a license applying to lands which did not come within the "reserve" rule

hereinbefore referred to, and would, besides, not include the fifty acre grant in fee independently secured under a subsequent statute, and made incidently with certain expenditures upon mining grants under the Act of 1884.

I would, therefore, hold that the plaintiff has failed in his claim to a share in Salt Pond mine and the fifty acre allotment.

With regard to the other square mile, I have no question that the plaintiff (Tilley) had a joint interest with the defendant (Cleary) to the extent of one-third in the mining land covered by the application of 1878; that the defendant (Cleary) must be held to have obtained it and held it as a partnership property in trust for him to that extent, and is bound to account to him for his interest in it, and, as he has sold it, for the money value of it. To such a case, and to the circumstances set out here, Statutes of Frauds and Limitations are not, in my opinion, to prevail in equity, and I can discover no evidence whatever of acquiescence, or abandonment, or breach of agreement on the plaintiff's part to deprive him of the remedy he seeks in this suit.

The right of property under the mining license to search originally issued is of a peculiar character, and a question may be raised whether an agreement to hold an interest in it with another on joint account is one affecting land so as to come within the Statute of Frauds; but, assuming that it was so, such an interest was after all simply the substratum of the partnership adventure or speculation to which plaintiff contributed his agreed share and performed his part, and by which the defendant secured to himself an advantage which he held in trust for others as well as himself. In other words, that this is a case for accounting by one partner to another (in equity a co-owner) for assets, the value of which has come to his hands.

A difficulty as to value arises from the confusion caused by a common sale for a lump sum of the several properties to the purchasers and present holders of the mines, and it might be contended by the plaintiff that the defendant had debarred himself by such voluntary confusion from setting up a difference of value in the properties assigned otherwise than in regard to their territorial extent.

The objection taken by the defendant as to the relative values of properties is so serious, and to hold that the plaintiff is entitled to be paid in proportion to the extent of the whole, might lead to such grave hardship that I think the defendant

is entitled to a reference and inquiry, at his own cost, as to the proportionate value of the "location" in which the plaintiff is by me held to be interested.

My judgment, differing from my brother judges, would be that the defendant (Cleary) be decreed to have acquired and held the mining property of which he obtained a lease in 1885, under the license issued in 1878, in trust for the plaintiff to the extent of one-third interest therein; and that he do account to the plaintiff for one-third interest in the purchase money of that part of his sale to McNicholl and others, subject to deduction for any charge and expenses on the property which ought to be commonly borne by the partners, and that it be referred to the master to inquire and report whether the property so decreed to be held as aforesaid is of value only as an adjunct to the Salt Pond mining property, and, if so, what its value as such is in relation to the whole of the property conveyed, and that the master do take an account of any charges and expenses incurred by the defendant (Cleary), and of which one-third ought to be charged to the plaintiff as a proprietor of one-third of the said property.

HON. MR. JUSTICE LITTLE:

The bill of complaint in this matter was filed on the 11th day of January, 1887.

The object of the suit was to compel the defendant (Cleary) to account for the purchase money of certain mining properties sold by him, in which complainant claimed an interest to the extent of one-third thereof, by virtue of an agreement alleged to have been entered into by parol by and between the parties. The defendant (Cleary) denied the terms of this agreement, and pleaded the Statutes of Frauds and Limitations. The defendant (Henderson) relied on the same defence to a certain extent, and submitted himself to the decree and judgment of the court.

The principal grounds forcibly advanced by complainant's counsel are that the provisions of the Statute of Frauds do not apply in this case, and even if they did so apply in the first instance, the agreement is now relieved from their operation because of the alleged part performance by complainant in furnishing to defendant the information and description of the localities for which the applications were to be made, and that the agreement was one not relating to an interest in lands as con-

templated by the statute, but for an interest in the profits of a co-adventure, and the property was to be held by defendant merely in trust for a partnership, &c.

Now, to arrive at a satisfactory solution and determination of the questions involved, and at a decision on the rights of the parties, our attention must be confined to the statements contained in the bill of complaint, the evidence filed in support of these, and the established principles of law and adjudications applicable to such facts, and circumstances as are of record in these proceedings.

The complainant, by his bill, charges—"That in the year 1876, Philip Cleary and Daniel J. Henderson, and the complainant, entered into an agreement to secure certain lands in this colony for mining purposes. That under the terms of this agreement the complainant was to impart the defendants such information as was in his possession of, and in reference to, lands on which he had been prospecting for minerals, and to advise the defendant which lands to secure, with a view to a profitable working or sale, and *in consideration* of such information the said defendant (Cleary) was to pay all expenses for securing said mineral lands, and the complainant and defendants were to *have* and possess one-third *interest in the lands so taken.*"

This, then, being the very basis of the claim made in the suit, the court is called upon to give it full legal effect, and enforce or decree a specific performance of its terms as against the defendant. Referring to the evidence and applying it to this charge in the bill, aside from the contradiction and denial of Cleary as to its terms, it is found this arrangement was actually made, that it was entirely verbal, reliance being placed by the complainant on the written note appearing in the statement of the case to change its character in this particular.

Is this, then, such an agreement as, in its nature, can be supported in law and equity. By the 4th section of the Statute of Frauds, it is provided that, "*No action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be therewith, or some other person thereunto by him lawfully authorized, &c., &c.*"

As before observed, the basis of the agreement was the acquisition of an interest in certain lands for mining purposes. The

petition to the Executive for the license at the time was for the exclusive right of search over the land described, not exceeding three square miles, &c., and in the words of the statute under which the application was made, "The Governor in Council may grant an exclusive right, &c., to any person for any period not exceeding two years from the date of the license, over any space not exceeding three miles, &c., &c." The application was for an exclusive right or "interest" in and to the land, and after the exercise of that right or uses for such period, the interests so acquired might be enlarged and a lease or grant issued to the licensee. But the parties, themselves, do not contend against this position, nor could they reasonably do so in view of the statement of their claims on record. I am satisfied that the alleged contract was entered into, and did intend, to effect and secure an interest in land, and it was such an interest or right as would be within the terms or provisions of the statute in question. It has often been decided that this section of the statute applies to contracts concerning an interest on land, not being contracts of sale. *Ex parte Hall*, 27 W. R., 385; 10 C. D., 615, *Alchin v. Hopkine*, 1 Bing, N. C., 77.

Although the agreement or contract being merely by parol or verbally, as is stated, entered into by the parties and so far subject clearly to the operations of the recited provisions of the statute, still, counsel contends that the note given complainant by the defendant (Cleary) is sufficient, with the aid of the parol testimony of the parties, to take it out of the statute.

But I hold the note to be wholly insufficient for that purpose—in fact, owing to its meagre character and vagueness the inevitable necessity of being obliged to resort to parol evidence to supply its wants and render it intelligible only emphasises the necessity of an observance of the provisions of the Act, in order that gross mistakes, sworn contradictions and grave misunderstandings may be avoided in such transactions.

And, as bearing on this phase of the case, reference may be had to a part of the judgment deliverence in *Caddick vs. Skidmore*, 2 D. G. & J., where it is observed that, although the court has struggled to bring within the description of a signed agreement any instrument however informal, which does in truth disclose what the terms of the contract were, it has never repealed the Statute of Frauds by holding a writing to be within its meaning which has not that effect, *i. e.*, which does not by plain words "or reasonable inference disclose what was the contract of the parties. The parties are distinctly at issue as

to what the contract was, and the very object of the statute was to prevent parol evidence being gone into to elucidate that which the parties have failed to make distinct by reducing it into writing."

I cannot recognize this, therefore, as a writing that can be regarded as a sufficient memorandum, nor does it even inferentially disclose what was the contract, and in no degree, under the circumstances, meets the requirements of the provisions of the Act. Then, it is contended with some force, that there was a part performance, which in itself, it is urged, is sufficient to relieve the case from the difficulties surrounding it, calls for a confirmation of the agreement and justifies a decree for specific performance of the remainder.

This part performance is the alleged supplying of the information, by complainant, of the plot or area for which licenses should be taken, and in consideration of the information so given it was arranged that complainant was to have the one-third interest so claimed. The act here performed is the giving of the information to Henderson, which was, as alleged, subsequently utilized by Cleary, and resulted in his acquiring the lease of the Salt Pond mine and other property. At the time it was so given, the complainant, it appears, had no right or title to the land in question, and gave the information merely in the hope and on the understanding of ultimately receiving the interest in the mineral lands so to be secured.

In my opinion these circumstances do not present or support such a case as would call for or justify the extension of the rules of law and equity under which the doctrine of "specific performance" is applied by courts of equity; and as the doctrine is one which has frequently been the subject of varied judgments given in the reports, it is necessary reference should be had to some of these to determine on the contention arising at this stage of the case. Primarily I regard this act set out as the alleged part performance as the first and only step taken by complainant in the matter of the agreement, and it preceded the performance of any part of the arrangement by the other parties; and the subsequent acquisition of the land, or part of the land, by Cleary, is alleged by him to have been obtained irrespective and not in consequence of that information so stated to have been furnished.

On reference then to the absolute adjudications and not mere dicta applicable to such a position, we find "that all the authorities shew that the act relied upon as part performance must

be unequivocally and in its own nature referable to some such agreement as that alleged.”—(*Cook vs. Jackson*, 6 *res.*, 14 *res.*, 386, 1 *Sw.* 181.) It is in general of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their rights, they would be in if there were no contract, &c. The act may admit of explanation, and is not in general in such cases admitted as sufficient to take the case out of the statute.—112 *B. D.*, 130. It will be found on applying these principles to the position of the parties and the facts in evidence, that at the time of the alleged contract complainant had no claim or title to land in question, or to any interests or rights to its issue; no alteration occurred or took place in the position of the parties or any of them towards the property until after 1878. Their relative position underwent no change at the time after the alleged part performance up to that year, and no step appears to have been taken nor any loss or expense to have been incurred by the complainant in relation to the transaction up to that time, when they were fully informed and made aware of the unsuccessful result of the application for the licenses made by the defendant Cleary. Subsequently, when these areas of land were open for appropriation, any party was at liberty to apply for a license, and acting or operating as such licensee, his position could not unequivocally be attributable or referable to this partly performed contract so set up as existing between these parties. Again, in support of the objection thus presented to the legal and equitable character of this act as one of part performance unsupported by any preceding circumstance, we find further reference to the principle in *Matheson vs. Alderson*, 8 *L. R.*, *A. & C.*, p. 476, as follows:—“That it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gesta* subsequent to and arising out of the contract. So long as the connection of these *res gesta* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gesta* themselves, justice seems to require some such limitation to the scope of the statute, &c.” Again, in the case of *O’Rielly vs. Thompson*, 2 *Cox*, 27, where by an agreement entered into by parol that upon the plaintiff pro-

curing a release from a party defendant would convey. The plaintiff procured the release by paying a valuable consideration. This was held not a part performance, and that the Statute of Frauds could be applied to a bill for a specific performance of such an agreement.

Knight Bruce, C. J., delivered a like pronouncement on this doctrine, and held that in a contract for the sale of land, though all the money be paid, without part performance (for the payment of money is no performance) the contract could not be carried into effect if the person sued wished to avail himself of the fact. In *Nurphall vs. Jones, 1 Swan.*, Sir Thos. Plumer held that in order to amount to a part performance, an act must be unequivocally referable to the agreement, and the grounds on which courts of equity have allowed such acts to exclude the application of the statute is fraud. The governing rule is, therefore, well established, and the doctrine so clearly determined, and in its regard there can be no difference between law and equity. It is a case clearly within the operation of the section, the alleged part performance being insufficient to relieve it of that operation. As to the charge of fraud, which, put forward and sustained, would relieve the case from the operation of the provisions of the statute, the evidence does not present any substantial grounds for such a charge, and the circumstances surrounding the case lead altogether to an opinion quite opposed to such a position. This is more apparent from the fact that after the complainant had been informed of the defendant having made the application, nearly two years elapsed, no further trouble appears to have been taken about the matter, when again, he and Henderson were informed by Cleary that the application was refused and that he had paid the necessary fees, still no interest is taken in it by them, and from their experience with mining matters and consequent knowledge of the facts connected with such refusal, evidently accepted the position and had made up their minds to be quit of the transaction. In support of such a theory, we find Henderson subsequently, in 1878, carrying on prospecting operations over this Pelley's Island property, in connection with one Guzman; and after this it is found that another application is made by Cleary for a license to search over the same land. The parties, in my mind, were well aware of their then respective positions, and after so lying by for a number of years, they, under such circumstances and in view of the facts, there is no apparent justification in charging fraud in order to give vitality to their agreement,

CLEARLY

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the contention on this...
D. G. & J., p. 62, where...
a lessee of a mine, and...
the reserved rent, subtracting the...
the profits, it was held...
and not sufficiently proved by a receipt signed by A and...
for a sum, as B's share of the...
the Chancellor, in delivering judgment, stated...
the last receipt may show, and does show, that there...
was certain terms, one part of which was that plaintiff was to...
part of the rent, yet it does not show what the...
terms were according to which the other partners were to...
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From the cases referred to, and others of like tenor given in the authorities, we find that the apparent hardships resulting to parties from a failure to escape from the operation of the statute have formed the subject of observation in repeated adjudications, still the law cannot be strained nor explicit enactments overruled in order that favorable decisions may be given in cases where the most ordinary essentials have been disregarded by parties seeking redress under such circumstances or entering into transactions of this character.

It was in the next place contended by the learned counsel for the complainant that the agreement was not for an interest in land, notwithstanding the claim set out in his pleadings, but for an interest in a co-adventure.

This position is based on more untenable ground than others advanced by him. I am unable, even inferentially, to conclude from the circumstances that such a partnership for this so-called adventure was or could be the subject matter and objects of the alleged agreement. I say this having regard to the intelligence and experience of the parties, and viewing, under the provisions of the Act regulating mining matters and operations, the heavy pecuniary responsibility to be assumed by defendant as lessee or grantee, and the nature of the operations to be conducted and the time limited by statute for their performance, I cannot infer that any such relations were intended to be created by such an agreement as that alleged to have been entered into by these parties.

And if such business relations were attempted to be created in this matter, still, under such circumstances, the provisions of the Statute of Frauds, in my opinion, would not be obviated.

A case somewhat analagous may be referred to as finally disposing of the contention on this ground; it is that of *Cuddick vs. Skidmore, D. G. & J., p. 52*, where, under a verbal agreement between A, a lessee of a mine, and B, to become partners in the mine, paying the reserved rent, subletting the mine at a royalty and dividing the profits, it was held to be within the Statute of Frauds and not sufficiently proved by a receipt signed by A and given to B for a sum, as B's share of the head rent of the mine. The Lord Chancellor, in delivering judgment, stated *inter alia*, "Now, the last receipt may show, and does show, that there were certain terms, one part of which was that plaintiff was to pay part of the rent, * * * yet it does not show what the other terms were according to which the other partners were to be mutually interested in the result. * * The plaintiff states

the intention to have been that the partners were to be jointly interested. The defendant insists, that although a joint interest, &c., the parties are distinctly at issue as to what the amount was and the very object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties have failed to make distinct by reducing into writing." This was held to be a conclusive answer to the bill of complaint, and the grounds given by the Lord Chancellor for its dismissal were that the agreement was one for the purchase of an interest in land which was not reduced into writing, &c.; that there was no part performance * * * that defendant set up a different agreement from that which was insisted on by the plaintiff, and claimed the benefit of the statute. This is a case which may be regarded, on this particular ground, as analagous with the present so much so as to render any particular comparison or observation unnecessary. It is last suggested, and with great force, that a trust may be fixed on the land so acquired, or that such a trust may be raised against the defendant on this alleged agreement as to oblige him to account or respond to complainant for the lands and the proceeds thereof. In relation to this point I fully recognize the inconsistency apparent between the statement in defendant's answer and the testimony given by him. His statements of merely advancing the necessary fees for that application and for a subsequent transfer of the license are met by the distinctly and clearly maintained contention on the part of the complainant and Henderson of a joint interest in the undertaking. Whatever the result of proceedings might have been against Cleary had he obtained the license on such application, as agent of the parties, this adjudication must be confined to the present status of the parties, as set up, and to the data now presented on the record. The weight of the evidence is with the complainant, and, aside from admissions on the part of defendant leading to other issues, it must now be decided whether or not the agreement so alleged is sufficient to sustain this last point or ground which is not set out in the bill of complaint or referred to in the evidence of Tilley or Henderson. However anxious one may be to support the trust thus endeavored to be raised, I cannot find that, under the rulings in decided cases bearing on the matter, a pronouncement in favor of complainant can be so far justified. And as bearing on the position thus presented to the court, we find that Lord Justice Turner, in delivering judgment in the case

of *Smith vs. Matthews*, *L. T. Reports*, 1861, in chancery, upon a precisely similar question of fixing limits, stated "that the case must not be decided on inference merely, or according to inclination, but according to rules of law. A court of justice can't be too careful not to allow the rules of law to be frittered away * * * the law which governs the question whether a trust can be so fixed is found on the 7th section of the Statute of Frauds "that all declarations or creations of trust or confidence of any lands, tenements or, hereditaments, shall be manifested and proved by some writing signed by the party who is by law entitled to declare such trust, &c., &c." Have we any such written manifestation in this case? And again, in *Foster vs. Hale*, 3 *ves.*, 707, Lord Alvanley laid it down (*inter alia*), "that it is not required by statute that a trust should be created by writing, but that it shall be manifested and proved by writing * * * and then the statute is complied with and the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit it must be proved *in toto* not only that there was a trust, but what it was." It is needless to observe that the necessary ingredients there referred to to create such a connection between the parties are in this case almost entirely absent. Again, we find the case of *Dale vs. Hamilton*, 15, *Her.*, p. 383, in which the status of parties in such a contention as the present is pertinently put, and the facility with which the provisions of the Act might be evaded if interests in lands of a certain specific character were attempted to be created under such circumstances. Whilst expressing my inability to see the force of the claim made on this ground of contention by the complainant, I fully recognize the consequences resulting in the case of the purchase of lands by a mere agreement, and that it has been held that a trust attaches, as in the case *Taylor vs. Salmon*, 4, *Myl and Cr*, 139; but the question of this particular character of agency, as previously observed, is shut out from consideration by the pleadings, and otherwise does not arise at this stage in the history of the case.

These extended references to adjudications render it unnecessary to analyze the evidence or apply in detail these clear pronouncements to the facts set out in the case. It appears to me, therefore, to be clearly established that this agreement set up by these parties, irrespective of their contradictions in reference to its details, was one distinctly relating to the acquisition of an interest in land; that it was made up entirely

of verbal understandings resulting in this parol agreement; the memorandum referred to being, from its uncertainty and indefiniteness, wholly insufficient to fulfil the requirements necessary in such cases to give such an agreement force and legal effect. The alleged part performance, preceding as it did the entering on the contract and consisting of mere voluntary statements of opinion or advice, does not contain, in these and other respects, these elements requisite to make it legally effective to take the agreement out of the operation of the statute.

It might be observed that the complainant himself, on having the conversations with the defendant Henderson, in the first instance, and for some time after, fully realized the necessity of having a written agreement on the subject, and probably would have insisted on it if the transaction had not been evidently regarded and accepted as ended and terminated by the unsuccessful result of the application for the license in 1876. Accepting the facts and data as they are briefly presented, and viewing the position of the parties all through, it appears to me impossible to relieve the case from the effects of the provisions of the sections referred to of the Statute of Frauds. The hardship resulting to litigants under such circumstances has been sufficiently observed on in the authorities cited, and the evils and inconveniences arising from a non-observance of the terms and requirements of the statute are also sufficiently pronounced on and do not call for further notice in this judgment.

I must again, as regards the equities arising on the evidence, refer to the official statements coming from the Surveyor General's department that the land now held by defendant, and on which the Saltwater Pond mine is situated, was not covered by or included in the description in the application made in 1876; also, that over 340 acres of the land in the area so applied for and lying and being at the S. W. end of Pelley's Island, as mentioned in the alleged agreement, are now, and have been for some years, unappropriated and open to occupation. Again, it may be observed that on the refusal by the Government to accede to the application first made by defendant, it was subsequently open to complainant, or any of the party, to apply for the right sought for; this he and the defendant were aware of, as was practically shown by Henderson in carrying on active operations with Guzman in prospecting the same lands, and by the subsequent applications made by Cleary.

Further reference and observation on other matters and contentions presented on the record and hearing of the case, would

be unnecessary and uncalled for. I am satisfied from the evidence and the plain facts of record and the clear and cogent rulings and judgments applicable thereto, that the claims contended for in the complainant's bill must be dismissed. I consider the agreement is impossible of being enforced because of the operation of the provisions of the Statute of Frauds, and on none of the grounds put forward by complainant is he entitled to a decree under the evidence given in this cause.

Mr. Davis, for plaintiff.

The Attorney General, for defendant (Cleary).²

McKAY v. RENOUF, CLEMENT & CO.

1887, November. HON. MR. JUSTICE PINSENT, D.C.L.

Master and Servant—Contract—Breach—Minor—Covenant not to marry—Dismissal—Damages.

The plaintiff, an infant, had come from Jersey to Newfoundland under articles of indenture, a covenant of which prevented his marrying. He was dismissed by his employer for breach of the above covenant. In an action for wrongful dismissal—

Held—That the covenant was an independent one, and its breach did not dissolve the articles of indenture, and that his employers were bound to take him back. The measure of damages would be the time he was out of service.

THE case was one arising under articles executed in Jersey, to be performed in this country, and one of the chief points was whether the plaintiff, an infant under the age of twenty-one years, had subjected himself to dismissal by reason of his marrying.

The court held that the covenant was an independent one, and its breach did not dissolve the articles, and that the plaintiff was bound to return to the defendants' service, and the defendants to take him, and the question of damages in this action would only arise upon the time plaintiff, if he had been dismissed, had already been out of service.

The parties thereupon agreed to give up the articles, and arranged upon a sum for past services of the plaintiff.

Mr. Carty and *Mr. Greene*, for plaintiff.

Mr. LeMessurier, for defendant.

1887, *December*. HON. SIR F. B. T. CARTER, C. J.

Master and servant—Contract—Breach—Dismissal—Notice—Damages.

A party residing in Scotland had come to Newfoundland under an agreement with the Newfoundland Government for five years, terminable at the end of the first year by either party giving to the other a three months' notice. At the end of the first year a notice was given by the Government terminating the agreement. In an action for wrongful dismissal,

Held—That to effectually terminate agreement at the end of the first year, the notice should have preceded that time, and damages were given accordingly.

THE plaintiff sued in this action under the Colonial Act, cap. 29, con. stat., for the recovery of damages for the alleged wrongful dismissal from the service of the defendant Government.

It appeared from the evidence taken *viva voce* before a commissioner in St. John's, that in January, 1886, Mr. James J. Grieve, residing in Edinburgh, who subscribed himself as acting for Mr. Walter B. Grieve and the defendant Government, by letter offered to the plaintiff, then also residing in Edinburgh, the situation of superintendent of roads in this colony, to reside in St. John's, the capital, the engagement to be for five years from his arrival here in April, but open for either party to terminate the engagement at the end of one year at three months' notice. In consideration of his services being faithfully and energetically performed the defendant Government agreed to pay him a salary at the rate of one hundred and fifty pounds, sterling, per annum, payable monthly or quarterly at his option; should there be a dwelling house attached to the department at St. John's he was to have the use of it free during his engagement, a free second-cabin passage by mail steamer was to be provided out from Liverpool, and the same home at the end of one year or five years; further, to meet his objection to delay in not entering upon his engagement at once, Mr. Grieve agreed, upon the part of the defendant Government, that the plaintiff's wife and family should also have free second-cabin passages out and home. The defendant Government might desire he should supervise or assist in the management of the water works at St. John's, all locomotion, travelling and personal expenses to be paid by the Government. After some negotiation the plaintiff accepted this offer and arrived here with his family in April, 1886, on the 22nd of which month he commenced to discharge the duties of his situation, and continued to do so until the same date, 1887, on which day he received a communication from the Honorable the Colonial Secretary, by

direction of the Government, that, inasmuch as they did not intend during the present year to continue those works of a large and important nature, and in connection with which his (plaintiff's) services were chiefly required, he would please consider that his engagement would terminate in three months from that date, and if he felt it to be for his advantage to leave in the meantime the Government were disposed to meet his wishes in that respect. On the following day, viz., the 23rd April, the Colonial Secretary was informed by letter from Messrs. Whiteway & Johnson, the solicitors of the plaintiff, that they, for him, did not assent to the termination of the plaintiff's agreement as proposed, nor to the proposition contained in the latter clause of his letter, and that plaintiff was willing to abide by all the terms of his agreement with the Government; and on the 22nd July, the same solicitors, in a letter [to the aforesaid Colonial Secretary, in which they referred to a notification received on the morning of that day from the Chairman of the Board of Works, by their client, of instructions given by him, the Colonial Secretary, that he was not to give the plaintiff further employment for the Government and that he was no longer in their service, advised the Colonial Secretary for the Government that the plaintiff was ready to perform his part of the aforesaid agreement, and notified that, in the event of a reply not being received the next day, that the action of the Chairman of the Board of Works, taken in conjunction with the letter of the 22nd April last, would be construed as a wrongful dismissal of the plaintiff, and that the Government would be sued for damages without further notice. The defendant Government adhered to their notice of dismissal, hence this action.

There was no evidence attempted to be given in proof of incapacity of the plaintiff to discharge the duties of the aforesaid situation, nor imputation of any kind on his conduct or character; and it will be observed that the letter of the Colonial Secretary of the 22nd April last is rather complimentary than otherwise to the plaintiff as his services were being dispensed with, it not being the intention of the Government to continue during this year (1887) "those public works of a large and important nature in connection with which plaintiff's services were chiefly required."

The chief contention of counsel on behalf of the Government was that they had a legal right, according to their interpretation of the stipulation, to terminate the engagement by a three

months' notice which they had given to the plaintiff at the end of the year, and doubtless they would have had that right if the notice had been given at the proper time; whatever doubt on this point might be entertained on a cursory perusal of the offer of Mr. Grieve, which the plaintiff accepted and which formed the basis of the mutual agreement of the parties, it is clear from the context that a notice to effectually terminate the engagement at the end of one year should have preceded that time, and had that course been observed the plaintiff would have had nothing of which to complain, and would not have sustained the loss to which he has testified, having made his arrangements consequent thereupon at the time he accepted the situation; when, therefore, the notice had not been given for the termination to take place at the end of the year, the plaintiff might reasonably enough have contemplated retention in the service of the Government, with the emoluments arising therefrom, for the remainder of the term of five years.

In this case we have the combined duties of judges and jury imposed upon us by statute. We find the defendant Government have paid into court, towards passages and travelling expenses for plaintiff and family from this country, \$150, and on same account an additional sum of \$85.79 was admitted to be due and promised; besides this, on full consideration of all the circumstances, we have estimated that the plaintiff is fairly entitled to damages in the further sum of £165 sterling, making *in toto* \$1,027.79, for which amount we give judgment with costs.

Sir W. V. Whiteway, Q. C., for plaintiff.

The Attorney General, for defendant Government.

1887, December. HON. MR. JUSTICE LITTLE.

Practice—Writ of ca. sa.—Arrest—Irregularity—Rule nisi to set aside writ—Illegality of proceeding.

A judgment was given against a party at Burin in the Supreme Court on Circuit, on which judgment he was afterwards on a *capias ad satisfaciendum* arrested and lodged in jail at Ferryland. On application to have writ and proceedings had thereunder set aside, and the prisoner discharged, on the grounds of irregularity of process and illegality of proceeding, it appeared that the form of *fi. fa.* prescribed for Circuit Court practice, and which proceeded the *ca. sa.* had not been followed, and it differed materially from the one used; it also appeared that the Sheriff's officer surrendered the prisoner before bringing him to Ferryland by lodging him with the jailor at Burin, and afterwards took him out of the said custody.

Held—(1.) That the procedure, subsequent to the issuing of the *capias*, was irregular, in that the forms prescribed for the Supreme Court on Circuit were not followed; (2.) The Sheriff's officer, after surrendering the prisoner to the jailor at Burin, was not warranted in afterwards re-taking him without further authority.

THIS is an application on affidavits setting out certain circumstances under which the defendant, Emanuel Pike, was arrested, and is now in custody, under a writ of *ca. sa.*, issued on a judgment had against him during the recent session of the supreme court on circuit at Burin. A rule *nisi* was granted on the grounds set out in these affidavits, and hereafter stated, to set aside that writ and the proceedings had thereunder, and also on the sheriff of the Southern district, directing the discharge of the defendant from custody. On the hearing and argument of the rule, the attorney general, who first moved in the matter, was represented by Mr. Morison, for the defendant, and Mr. I. R. McNeily and Mr. Carty for the plaintiff and sheriff. The facts appeared to be correctly set out in the affidavit of Roile, the bailiff, and shewed that he (Roile) as deputy sheriff, in pursuance of instructions duly received from plaintiff's attorney, proceeded from St. John's to the district of Burin, and when at St. Lawrence, arrested on the 11th October last the defendant, under the writ of *ca. sa.*, now produced; that under this writ and sheriff's warrant he brought him to Burin, where, on the 15th of the same month, he delivered the defendant, with the warrant, to the gooler of that place, whereupon defendant was taken into the custody and charge of the gaoler. It appears, then, that the bailiff, as he swears, directed defendant on the 17th of the month to go on board the steamer *Curlew*, to proceed to St. John's in company with him, the bailiff, where they

arrived; and whereas, it is also stated, the defendant remained in the house of the bailiff with him, and thence proceeded to Ferryland by coach on the 19th of the same month, and was there surrendered to the sheriff of the Southern district, who placed him in the hands of the gaoler of that place, where he remains in custody. The *ca. sa.* under which this arrest was made, issued out of the supreme court under its seal, signed by one of its commissioners, attested in the name of the chief justice, and addressed to the sheriff of the Southern district, commanding him to take Emanuel Pike, if found within his bailiwick, etc., to satisfy George Pike in a certain amount which he in the said supreme court lately recovered against him, Emanuel.

This *ca. sa.*, it appears, had been preceded by a writ of *fi. fa.*, issued on the 23rd day of August last, attested in the name of the judge on circuit, and signed by a commissioner of the supreme court and addressed to the sheriff of the Southern district, commanding him to levy on the goods of defendant in his bailiwick to satisfy the amount of the judgment recovered in the supreme court by George Pike, and to this *fi. fa.* the sheriff returned *nulla bona*.

Now, under these circumstances and state of facts, it is contended that the *ca. sa.* should be set aside and the defendant discharged on the grounds of irregularity in the process itself and the illegality of the proceedings and conduct thereunder of the sheriff, or his deputy, in executing that process.

In my opinion, the plaintiff's attorney was warranted in the issuing of a *capias ad satisfaciendum* under the data appearing on file and of record; but I consider he should have adopted and followed the form prescribed by the provisions of cap. 21, at p. 124, con. stat., and which the learned judge must have contemplated when granting the order on which the *ca. sa.* issued. The forms differ in most important particulars, and as the judgment had been recovered in the supreme court on circuit, the prescribed form of writ should have been used in the absence of any regular transfer of that judgment. The *fi. fa.* appears to be in accordance with the form prescribed by law and adopted in the practice of the supreme court, there being no mention in it of the name of the place on circuit where the judgment was recovered or where the proceeds or amount of the levy should be had and produced by the sheriff, and at the same time it differs from the regular process of the supreme court inasmuch as it bears no seal and is attested in the name of the presiding judge on circuit.

The legislature, making it obligatory to particularise the places in circuit process for the delivery by the sheriff of goods or monies, the proceeds or results of levies under attachments or executions, or where the body of a debtor should be had and delivered by him to the court, has obviously done so to meet the convenience and interests of litigants, and to facilitate the administration of justice.

I therefore regard this course of procedure adopted by the plaintiff, subsequent to the order for the issuing of the *capias*, as irregular. As to the second part of the rule, even if the process were in all respects regular, in my opinion, the sheriff, after surrendering the defendant to the gaoler at Burin, was not warranted in again taking the party from such custody and carrying him to St. John's. The sheriff is a ministerial officer and is held to the strict execution of the process addressed to him.—6 C. & B., 520, *Bro. Max.*, 13.

Notwithstanding the statements on affidavit of the probable discomfort resulting to a defendant in being confined in the gaol at Burin and its unsuitableness as a place of safe-keeping, I am at a loss to understand how his removal to St. John's, and his detention then and subsequent transfer to the gaol at Ferryland, can be justified under the circumstances without any such authority therefor. The reasons advanced for the course thus pursued might in like manner justify the bailiff in proceeding to Bay of Islands *via* St. John's if the sheriff were there, in order to make that surrender of the body of the defendant, which counsel urge as the duty of the sheriff's officer in the execution of this writ. The bailiff, after the arrest, might have been justified in going out of the sheriff's bailiwick with his prisoner in order to convey him by the most convenient and safest route to the gaol or place of custody within the bailiwick; but, after having surrendered him to the gaoler in the bailiwick in the manner deposed to, he could not without further authority carry him out of the bailiwick without being guilty of suffering an escape. It is laid down by authority that if the sheriff, or other officer, in whose custody the defendant is, suffer him to go out of the limits of the prison for the shortest time, although with a keeper, it is an escape,—1 Ro., 806; *Arch. Pr. v. 1*, p. 452.

And in a case where an officer took the defendant from the bailiff's house to his own to enable the defendant to attend to some matters of business—in adjudicating on a case *Butler, J.*, observed, "Whenever the prisoner in execution is in a different

custody from that which is likely to enforce payment of the debt, it is an escape; the officer took the prisoner from the bailiff's house to his own, and for what purpose signifies nothing, he might as well have carried him to a horse race,"—*1 B. & P. Benton vs. Sutton.*

And again, we find in *2 W. Bn., p. 1048*, in noting the difference between escape under arrest under mesne and final process, in the latter case, if the sheriff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards re-take him,—per Ashurst, J.,—and the same ruling will be found in *2 T. R., 176*,—"The sheriff hath no power or authority out of his county,"—*2 Roll. Rep., 163, Plowd. 37.*

I cannot, therefore, find that the sheriff was warranted in the removal of the defendant from Burin to St. John's and thence to Ferryland, and consequently consider the rules granted in this matter should be made on certain conditions which I shall direct to be inserted in the rule. In arriving at this decision, although I am necessarily restrained from observing on the merits of the case on which the judgment was obtained in the court on circuit, I cannot refrain from stating that the circumstances of defendant's imprisonment, or inconvenience or hardship resulting therefrom, appear to be deserved and not entitled to any sympathy or consideration at the hands of those charged with the administration of justice.

Mr. R. McNeily and *Mr. Carty*, for plaintiff and sheriff.

Mr. Morison, for defendant.

1887, *December*. HON. MR. JUSTICE PINSENT, D.C.L.

Trespass—Damage to house and crops—Setting fire to forest—Act of defendant's servant.

Where the defendants had gone into the country and had left a boy to make in a fire, directing him to light the same. The boy, exercising his judgment, had kindled the fire in the woods, and not on the road, as directed. The fire almost immediately caught the woods and ultimately spread to the plaintiff's house and crops, which it destroyed. In an action for damages, it was contended there was no liability, in that there was no proof of negligence, and that the act was the act of the servant, not within the scope of his authority.

Held—That the defendants were responsible for the act of their servant, the lighting of the fire being within the scope of his authority, the manner of doing it was not to affect the rights of the plaintiff. The fact of the woods catching on fire was a presumption of negligence.

THESE were similar cases by different plaintiffs against the same defendants for the destruction of their houses and crops, situate on a clearing lately made on the new South Pond road.

It appeared that on the second of August the defendants went into the country shooting; they took with them a boy to attend to their horse and to light a fire. When they left the road for the woods, they left the boy in charge of the horse, and directed him to light a fire when, upon their return, he should hear them fire two guns; they pointed out to the boy a place in the middle of the road as the best place for making the fire. Defendants on their return accordingly fired these guns, and the boy set light to the fire, which he had laid in what he considered a better place than the road itself, viz., in a small open space inside the woods and off the road. He had at first laid the fire on the road as he had been directed by his employers, but thinking it to be too much exposed to the wind there, he had shifted it; it was blowing hard that day; the fire almost immediately caught the woods and became uncontrollable by the boy and by the defendants, who shortly came upon the scene and did their utmost to stop it. It raged for some days, and on the second day of its burning reached the houses of the plaintiffs, more than three miles away, destroying them and also some small crops. One plaintiff valued his loss at nearly £80 and the other at £40, while the defendants upon this point had evidence to the effect that the houses were worth about £10 each and the crops 30s. The defendants had been taken before the magistrate under the local statute and fined nominally ten shillings and twenty shillings, the plaintiffs

being left to their civil remedy. It appeared, too, that the defendants were, with other people in the locality, active for some days in endeavouring to extinguish the fire in the woods. There were several more distant fires in the woods about the same time.

At the close of the evidence the judge said that he was sensible of the hardship of this case, no matter how the judgment went—if for the plaintiffs the defendants would suffer severely, when certainly they were free from any injurious intention and their conduct had been meritorious after the fire commenced; on the other hand, the act of their servant in executing their order had caused the plaintiffs very serious injury; and if they were held not to be liable for *that*, the plaintiffs would be without redress, and his lordship left the parties until the morning to consider his suggestion of an amicable arrangement.

The parties not having arrived at a settlement, the judge, in pronouncing judgment, said that he had carefully considered the position put by Mr. Horwood for the defendants, viz., that there was no proof of negligence, and that the act was that of defendants' servant, not within the scope of his authority and in contravention of their orders in not putting the fire in the place directed by them. While the court was free to admit that the defendants acted without any wilfully negligent or mischievous intent, and to concede, as one of the defendants said, that it was to his interest to preserve the woods rather than to be a party to any act to destroy them; the defendants must be held responsible for the act of their servant who was employed by them to light a fire, and within the scope of whose authority the doing so therefore was. His disobedience to his employers' orders as to the manner of doing it was not a question to affect the plaintiff's right of recovery, and the court doubted whether the boy's discretion as to the place was not better than theirs. The question then remained whether there was negligence. In the opinion of the court, the very fact of the woods catching fire raised the presumption of negligence; but, moreover, the boy was left to discharge the duties of both looking after a horse and lighting and attending to a fire—and that on a windy day in a season described by one of the defendants as "a terrible summer for fires." It was indiscreet to light a fire in such a place, and, moreover, the defendants should, at least under the circumstances, not have caused it to

done until they themselves were present and could control it. The defendants must be held liable; but in considering the damages the court would regard their cases as moderately as possible, and would assess the damages in one case at \$80, and in the other at \$60; and hoped that the decision in these cases would act as a wholesome warning in preventing the constant recurrence through carelessness of destructive forest fires.

Mr. Emerson, for plaintiffs.

Mr. Horwood, for defendants.

QUEEN v. BROWN, ET. AL.

1887, *December*. HON. MR. JUSTICE PINSENT, D.C.L.

Larceny—Fisherman—Shareman—Undivided share.

Three prisoners being in custody for larceny for forcibly taking their undivided share of fish. The judge, in discharging them,

Held—That sharemen in the fishery had no right to take possession of their assumed share of the voyage, during its continuance, or at any time till set apart for them, and they would be liable criminally if by force or stealth they took their undivided share.

THREE men (sharemen) being in custody on the magistrate's committment for larceny in forcibly taking fish which they claimed to be their share of the voyage, and the Crown officer considering it inexpedient to prosecute them, as it appeared the master-voyage (as he said from fear) had weighed out the fish to them, and the value of the fish taken was not very great.

The judge, in discharging the men, said that to prevent any false impression which might arise from the merciful discretion of the Crown in this instance, he desired it to be clearly understood, so that these men and others might not hereafter be in ignorance of what he conceived to be the law, that sharemen in the fishery had no right to take possession of their assumed shares of the voyage during its continuance, nor at any time until and unless it was set apart for them. Their shares, or the value of them, represented wages which they might never earn, or might forfeit, and which were subject in the first place for the accounts for supplies issued to them. Their interests were already carefully secured by the law which made them preferential creditors, and also enabled them to follow the

value of the produce of the voyage in the hands of the receiver, and they would be liable criminally if they by force or stealth took their undivided fish from the planter or employer. Any other position would be destructive of all confidence between the various classes employed in the fishery, and be destructive of their mutual interests.

COOK v. STABB AND ROCHE.

1888, *January*. HON. MR. JUSTICE PINSENT, D.C.L.

Master and servant—Contract—Breach—Dismissal—Damages.

The defendants, lobster packers, engaged the services of the plaintiff in the month of June as superintendent of one of their lobster factories, giving him control of the factory and fishermen. In July he was dismissed by a note from one of the defendants on the grounds, amongst others, of his refusal to cease "taking account of lobsters" where a man had been appointed by defendants to do this special work, under the plaintiff. In an action for wrongful dismissal, in which the refusal to obey the orders referred to was not denied,

Held—That the refusal was justified, in that the servant was superintendent of the factory and fishermen, that in the successful carrying out of his duties, his own business reputation was at stake, and any interference with him was a breach of agreement by the defendants.

THE trial of this case was held before me partly in the Bay of Islands, and was concluded in St. John's after further evidence taken under commission had been returned.

The action is taken to recover damages for wrongful dismissal of the plaintiff from the service of the defendants, trading as Stabb & Co. The facts are, shortly, these: The defendants purposing to establish a lobster factory at Crabb's Brook, in the Bay of Islands, made overtures to the plaintiff to become their superintendent, and to aid them in choosing the site and putting the establishment in working order. The plaintiff accepted their offer, and entered into their service in April last. He continued therein until the 8th of July, when he was dismissed by the defendant, Roche. In June only the terms of the agreement between the parties had been reduced to writing, and were to the effect that plaintiff was to serve the defendants "in the capacity of superintendent of their lobster factory at Crabb's Brook;" his duties being "the control of, the preparing and canning of lobsters, and the people engaged thereat, as well as the lobster fishermen," and it was stipulated that he should

"from time to time, advise and consult with either member of the firm present, respecting any changes or outlays that he or they may consider necessary." The plaintiff's salary was to be fifty dollars per month, and good mechanic's board, and the agreement was to be in force to the end of the lobster season, which would be about the middle of October or the first of November. On the 8th of July, Roche being the managing partner of the lobster business of the defendants, discharged plaintiff from their service by a letter in terms following: "Your refusal to carry out our instructions relative to the dismissal of Roland Cook, also your non-compliance with our distinct orders, with respect to taking account of lobsters after having been told that a man had been appointed for that purpose, and that we did not wish you to do so, seems to us as if you have decided to ignore any and all authority of your employers, now as in the past." The letter concluded by informing the plaintiff that he is dismissed from defendants' service.

At the trial the defendants set up other complaints against the plaintiff, but I attach no importance to them, as they were not originally relied upon as the cause of discharge, and mainly arose before the agreement was reduced to writing and executed by the parties; and, moreover, consisted in great measure, of frivolous bickering and disputes between the plaintiff and the defendant, Roche.

With regard to the causes of discharge alleged in writing on the 8th of July, I find that the first is unsustained by the evidence. In the first place it appears to be very doubtful whether the dismissal of Roland Cook (a competent sealer of cans) was justifiable or consistent with the due conduct of the business; and secondly, it appears that the plaintiff did convey to him the directions of the defendant Roche, that there was no longer any work at the factory for him; and he ceased to do work there for the defendants. The second alleged cause for plaintiff's discharge is of a more serious character and more difficult of decision.

If this had been the case of an ordinary servant, I should have had no hesitation in saying that one wilful and deliberate act of disobedience would justify dismissal.

This, however, is the case of a superintendent or manager, invested with the control of the factory and the fishermen; a man whose peculiar business or profession such employment was, who had been employed because of his long and successful experience, and whose very name stood so high in the busi-

ness that it was used on the labels of the packages as a guarantee of superiority.

He swears that for him to take an account or tally of the lobsters was necessary to the satisfactory prosecution of the business—he required to know, day by day, and immediately upon the arrival of the boats, the quantities and quality of the lobsters landed, so that he might know the causes of deficiency, if any, and give instructions for better management. He moreover, adds that his reputation and his future good name and value were dependent upon his success, and that he regarded any interference with him in these matters as a breach of the defendant's agreement with him.

The defendants, on the other hand, claim that it was their right as proprietors to control the business in any manner they liked, and that they or at least the defendant Roche, preferred and considered it better for the business that the plaintiff should remain in the factory at all times, and not attend to the counting of the lobsters on delivery.

I am disposed to take the plaintiff's view of this question; I read his agreement as giving him the control and management of these details; and were a jury engaged in this case I should put it to them whether the conduct of the plaintiff in this particular was in the *bona fide* exercise of a reasonable and sound discretion, or whether it was the effect of caprice and wilful and unnecessary rejection of the defendant Roche's advice. I believe any jury would find in his favor. Moreover, I am of opinion that if the judgment of Roche was in this particular to be preferred to that of Cook, the former was much too hasty in discharging the latter, upon less than a day's notice, and upon the first occasion of a difference in their modes of operation in this respect.

The plaintiff is, in my opinion, entitled to recover damages, which, after deducting the defendant's account and making some allowance for time left at his disposal, and which he might have turned to some profitable account, I assess at \$120.

Mr. R. McNeily and Mr. Carty for plaintiff.

Mr. Greene for defendants.

1888, *February*. PINSENT, J.; LITTLE, J.; CARTER, C. J.

Prerogative of Crown—Petition of right—Tenure of office—Servants of Crown—Dismissal.

Under "Claims against the Government Act," which Act supercedes the old practice of "Petition of Right," the petitioner sued the Newfoundland Government for breach of an alleged agreement in depriving him of an office which he had held temporarily under an acting appointment, and which, it had been agreed, he was to have permanently. The retainer by the Government, that petitioner acted and performed the duties for four years and was paid by legislative sanction, was admitted.

Held—That petitioner had no right of action; that a Colonial Government is on the same footing as Her Majesty's Government as to the employment and dismissal of servants of the Crown, who, in the absence of special agreement, hold their offices during the pleasure of the Crown.

THE petition in this case sets out that the plaintiff, being an honorary justice of the peace, and David Candow, Esq., stipendiary magistrate at Bonavista, having become, from permanent and incurable illness, incapable of discharging the duties of his office, the Government, in the month of May, 1882, "by their officer, in that behalf appointed and authorized, in consideration of the petitioner's undertaking to act as stipendiary magistrate for the district of Bonavista, and to discharge and perform the duties of that office, at and for an annual salary of one-third of the salary provided for such stipendiary magistrate until the said David Candow should be provided for by pension or otherwise, or until the decease of the said David Candow, whichever event should first happen, contracted and agreed with petitioner (upon the happening of either of the above mentioned events) to appoint him upon the usual terms upon which such officers are appointed, to wit, for life, or during good behaviour, stipendiary magistrate for Bonavista."

The petitioner alleges that, relying upon such undertaking, he discharged and performed the duties of stipendiary magistrate until the month of November, 1886, and that he was ready and willing to continue to fulfil those duties, but that the Government dismissed him and appointed Thomas Stabb, Esq., to be stipendiary magistrate for Bonavista. The petitioner claims that he is entitled to damages or compensation for his wrongful deprivation by the Government of this office, or rather for breach of agreement on the part of the Government in not giving him the permanent appointment.

The petition contains a further claim at the rate of \$100 per annum for services as commissioner for the distribution of poor

relief, the duties of which office appear to have been previously performed by the stipendiary magistrate without any special remuneration.

Upon this state of facts the petitioner seeks in this proceeding to recover a judgment of this court for damages, under chapter 29, consolidated statutes, entitled "Of the recovery of claims *ex contractu* against the Government."

This enactment prescribes proceedings by petition, answer and other pleadings, and for the taking of evidence, hearing and judgment similar to those pursued on the equity side of this court. The judgment, if in favor of the petitioner, is to be certified to the Colonial Secretary by the clerk of the court, and to be carried into effect by the Government either by payment out of the general revenue of the colony or by the performance of any act which may be directed, and judgment for the payment of monies may be enforced by process of execution against the monies, lands and effects of the Government, as in ordinary cases between party and party.

The present case involves a demand considerable in amount and important in principle.

There have been several claims for adjudication by this court under the enactment by virtue of which this proceeding is taken by the present petitioner. but none precisely similar in character, and it appears to me that the case is such a one as calls in more than common degree for a judicial exposition of that enactment and of the nature of the claims which may be preferred under it.

Prior to the passing of the Act now incorporated with the consolidated statutes, there was no mode of proceeding against the Crown except in the ancient manner of petition of right, which required the royal assent endorsed upon it by the sign-manual of the Sovereign, before any judicial proceedings could be taken.

The last case of that kind in this colony was *Archibald re. The Queen* for recovery of compensation for services performed as a commissioner for awarding compensation for damages occasioned by riot, in which the petitioner had to make application to the Queen and obtain the endorsement that "Right be done in Our Supreme Court." This was given and the claim was settled and never came on for trial.

This mode of procedure being inconvenient and dilatory the legislature passed the "Claims against the Government Act," which enables a complainant against the Government or any

public department to prefer his claim for adjudication without leave first obtained.

As I understand this enactment, it effected no change in the law otherwise than to provide a new mode of practice and procedure for the prosecution of claims which must otherwise have been made the subject of petition of right. It imposed no new legal obligations upon the Government to do or perform or pay anything to which it would not have been called upon to respond under petition of right. It conferred upon claimants no greater rights than they would have had without it, except the improved remedy by which their claims might be preferred and determined in a court of law.

The petitioner in this case relies upon an alleged contract with the Government (he being a justice of the peace) for his acting in the place of the then actual stipendiary magistrate at Bonavista, and discharging so far as a justice of the peace can, the duties of that office, in consideration of which he was to receive an amount equal to a third of the regular salary of magistrate, with the promise of appointment to that office upon full salary whenever it might next become vacant.

The petitioner, in his evidence, explains that upon the strength of this agreement he made other arrangements with regard to his practice as a medical practitioner, and took a partner who divides the business with him.

In proof of the alleged contract with the Government, the plaintiff deposes to oral proposals being made to and accepted by the attorney general of the day (who was also premier), and who, having been examined as a witness in this cause, confirms this evidence, and besides that gentleman, the plaintiff called the colonial secretary of that time to support his statement.

The latter official seems to have had no personal connection with the original arrangement except through his being party to a minute of Council, which is said to have contained it.

To the proof of this minute of Council the present attorney general, appearing for the Crown, objected.

Then there are the undisputed facts that the plaintiff was employed to act for Mr. Candow, that he did so act until the appointment of Mr. Stabb, and that he received the pay agreed upon, the legislature annually passing a vote to indemnify the Governor for the amount paid, thus: "To Dr. John Skelton, salary as magistrate at Bonavista, \$276.67."

It seems that the plaintiff has been regularly paid for his full term of service as magistrate, the amounts agreed upon, and the

question remains on this head whether he can now recover damages or a sum in the nature of damages because of the action of the Government in appointing some other person to the office of stipendiary magistrate at Bonavista.

It appears that Mr. Candow was, at the time of Mr. Stabb's appointment, and is, yet living, and it does not appear whether he has been pensioned or not, and his decease or retirement upon a pension were conditions precedent to the plaintiff being appointed to succeed him.

This, however, would, I think, make no difference, as if the facts here constitute a contract of the nature set up by the plaintiff the principle applicable to other contracts would apply, that where a party has rendered himself incapable of performing an act which is to be executed in future, an action by the person injured will thereupon lie against him for the breach of the contract.

With regard to the minutes of Council, I am of opinion that they are not of themselves evidence of a contract—that they are a mere *ex parte* note or register of acts and proceedings of the Executive, or of intentions of the Executive which may never take form or be carried out; that they are simply unilateral in their nature and of such a character in other respects that their disclosure should not be enforced by a court of justice; and if discovery of the original minutes should not be enforced it is plain that secondary evidence of their contents is inadmissible.

We must look, therefore, to other sources for proof of the alleged contract—to facts and proceedings to which the petitioner and the Government were both parties, and see how far they were and are legally responsible to each other.

The present Attorney General in his answer to the plaintiff's petition, denies: (1) The alleged agreement; (2) That any officer of the Government had or could have power or authority to enter on behalf of the Government into any such contract or agreement.

There can be no doubt about the plaintiff's retainer by the Government to perform certain official duties—this is in evidence from the fact that he acted and that he discharged those duties for a period of four and a half years with the knowledge and consent and under the pay of the Government, and with legislative sanction.

But the claim upon which we have to pass judgment is that which springs from the latter part of the alleged contract—

that to appoint the plaintiff, on the happening of certain events, to the office in which he was temporarily employed.

I concur with the answer of the Attorney General that no officer of a Government possesses the authority to enter into any agreement on its behalf for the bestowal of future office; and I am of opinion that the executive itself has no power to delegate any such authority; yet more, I think it is manifest that a ministry, until the executive Government shall have actually conferred an office by the regular constitutional mode or by the action of the supreme authority, cannot and does not in a legal sense bind itself or the Government.

To hold that an executive should, under any circumstances, be bound for such purposes by the action of one of its members, or by an officer of the Government, would be to countenance a practice fraught with infinite danger, and at variance with every constitutional principle, and with the effect of bringing down to the level of the commonest contract of bargain and sale, the appointment to any public office of the highest degree of importance and responsibility. I am, for similar reasons, of opinion that no such contracts, having a future operation, can be made by the executive itself.

But if an executive promise (for it is not a contract) were made, and were to culminate in a regular commission to office, it will be seen that it does not rest with any court to award compensation to its holder for deprivation or loss of office; how much less then for breach of promise to bestow one!

The commission itself is not a contract or agreement in the ordinary sense of the word, it is something bestowed or conferred at the pleasure of the Crown—subject to be altered or superseded, as the exigencies and interests of the public service require.

The Sovereign is the fountain of honor, of office and of privilege, and consequently the making and disposing of offices is a prerogative of the Crown, "and as the King may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be a tax upon the subject which cannot be imposed except by Act of Parliament." (*1 Blackstone, 272.*)

"Offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice." "Neither can any judicial office be granted in reversion; because though the grantee may be able to perform it at the time of the

grant, yet before the office falls he may become unable and insufficient." (*2 Blackstone, 371.*)

Offices may be granted at will of which there are many instances; and it is a general common law rule upon which, however, various exceptions have been supported by statute. (e. g., the judges of the Superior Courts) [that the King may terminate at pleasure the authority of officers employed by His Majesty."

In the colonies the Royal prerogative is exercised by the Governor; and his commission, for employments requiring a commission and his alone (under the great seal regularly, or his own seal in some cases) whether constitutionally or in courts of justice is the only evidence of appointment to office which we can recognize.

The Royal Letters Patent of the Governor of this colony empowers him to appoint "in our name and on our behalf all such judges, commissioners, justices of the peace and other necessary officers and ministers, as may be lawfully constituted or appointed by us," and by the instructions, "all commissions granted by our [said Governor shall, unless otherwise provided by law, be granted during pleasure only."

Our attention has been called to the Royal Letters Patent of several Governors of this colony, in reference to their powers of removal or suspension from office. Since the year 1864 the clause relating to their authority in this respect reads thus:—

"We do further authorize and empower our said Governor, so far as we lawfully may, upon sufficient cause to him appearing, to remove from his office or to suspend from the exercise of the same any person exercising any such office or place within our said colony, under or by virtue of any commission or warrant granted or which may be granted, by us in our name, or under our authority."

Prior to this time, the Governor was empowered to suspend only, and he was by instructions directed particularly as to the mode of proceeding to be observed towards the suspended officer, and he was required to transmit all proceedings to the Secretary of State.

The Governor's commission and instructions have, with the greater liberty and more nearly absolute control possessed by the executive government under the responsible system, been much modified, and the power of removal from office generally is practically absolute. A memorable instance of which in this colony is to be found in the case of Mr. Tobin, who being dismissed from the office of financial secretary, and at the same

time from the legislative council, appealed to Her Majesty, with the result that the local executive was left to its own action touching the civil service of the colony, while it was held that there was no authority to touch Mr. Tobin in his seat as a member of the legislative council, appointed by the Crown.

Under no circumstances, however, did any right of action lie in a court of law on the part of an aggrieved individual for neglect or violation of these instructions. They are in their nature matters directory for which Governors and executives are responsible to the Crown, but for breach of which they are not amenable in a court of common law; they form no part of a personal contract between the Crown and its officer.

In *ex parte Robertson, 11 Moore, P. C., 288*, a case in which the appellant, a commissioner of Crown lands in New South Wales, holding office during pleasure had been dismissed, it was observed in the judgment as follows:—"Their Lordships are all of opinion that the practice of this court is not to enter into the consideration of such dismissal, unless by the express command of Her Majesty. They do not enter into consideration of such acts as are done by the Governor and council of a colony, in the exercise of the power and authority committed to them whereby they dismiss persons from holding situations in that colony, they holding them, not by any patent right, but simply and only during the pleasure of the Governor himself."

The judicial committee of the privy council is a tribunal which may, by command of Her Majesty, inquire into causes of dismissal of a Government officer, and by virtue of the prerogative he might be restored: but this court, and no court of common law possesses any such power or right of inquiry.

If the present case were one of legal contract, capable of being dealt with by this court, I should have no doubt about the application as a remedy of the "claims against the Government act" to this class of case.

In the judgment of *Mr. Justice Blackburn, (Thomas vs. the Queen, L. R. 10, B. 31)*, the position that a petition of right will lie for a breach of contract resulting in unliquidated damages, was fully considered, made the subject of much learned research, and clearly maintained. The *Windsor and Annapolis R. Co. vs. the Queen, 11, App. cases, 607*, is another and very recent authority on the same point, and in delivering judgment of the privy council *Lord Watson* observes, "Their Lordships are of opinion that it must be now regarded as settled law that whenever a valid contract has been made between the Crown and the sub-

ject, a petition of right will lie for damages resulting from a breach of that contract by the Crown."

Our local legislation introducing the new practice expressly recognizes the same position by providing for the trial of "claims arising *ex contractu*," and contemplating and providing means for the recovery of damages for breach of contract.

But these claims are such as must be strictly matters of contract and such as but for the immunity of the Crown from all process, would be the subject of an action at law or a suit in equity.

By way of example, there are *Tufnell's and Grant's* cases. *Tufnell*, who had been an assistant surgeon in the army, stationed at Dublin, proposed to the Secretary of State to forego all further claims for promotion if he received the permanent medical appointment to the new military prison. His offer was accepted. He discharged the duties of this office for twenty-eight years, when he was compulsorily retired on half pay, and while he was willing and able to perform as usual the duties of his office. It was held that the court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which the suppliant ceased to hold office, and that the office was one tenable only *durante bene placito*.—(*L. R.*, 3 *Ch. Div.* 164).

A similar ruling is found in the case of *Grant vs. the Secretary of State for India* (*L. R.*, 2 *C. P. Div.*, 445). This officer claimed that he was employed so long as he was physically and mentally efficient, and he set up a claim for damages for being compulsorily placed on the pension list and for the loss of certain advantages, such as a pension to his widow incident to his office. In commenting upon the plaintiff's contention the learned judge (*Grove J.*) said: "If so, all officers whom a jury might consider to be physically and mentally efficient, could retain their places in the army notwithstanding they were found to be most unsuitable for them. The consequences of such a state of things to the well being of the realm might be most disastrous."

To the obligation to preserve the office of stipendiary magistrate at Bonavista for the plaintiff's use, I might, assuming the alleged promise to have been made, and no good reason to have arisen for departing from it, apply the language of *Grove J.*, commenting upon the judgment of *Tindal, C. J.*, in *Gibson vs. the E. I. Company*, (5 *Bing., N. C.*, 252), "This obligation wants the *vinculum juris*, although it may be an obligation *in foro conscientiæ*, a moral obligation which ought to be imposed, but it cannot be enforced in a court of law."

In *Gibson's* case it was also remarked in the judgment, "now it is clear that no action could be supported against any one to recover the arrears of half pay granted by the Crown, at least unless the money had been specifically appropriated by the Government and placed in the hands of the paymaster to the account of the particular officer."

We are called upon by the plaintiff in this case to support two or three dangerous, and in my judgment, untenable positions;—one, which if carried to its logical conclusion, would give the right to claim, and impose upon this court the duty of awarding damages to any individual who, for instance, might receive the promise of a public situation by any out-going ministry only to be disappointed by the next.

The court cannot be too particular in guarding against political traffic of this character, although I feel bound to say, with regard to this particular case, that it seems to be as unobjectionable an instance of the promise of prospective office as can be imagined, made prudently at the time and not as a political bargain.

Another position involved in the plaintiff's claim is that the court should do what the Crown cannot (at least without indemnity) do, usurp the functions of the legislature and compel payment of official stipends which that legislature has not provided, or correct and increase the amount given when it may be considered insufficient.

Moreover, the Supreme Court is asked to place itself in the position of inquisitor into the discretion and integrity of governments in the regulation and control of the public service, for which the executive alone is responsible, and in the exercise of which it must be guided from time to time by considerations of necessity or expediency into which it is no part of the duty of a court to inquire, nor even at times for a Government itself to explain.

The only part of the transaction between the plaintiff and the Government which this court can entertain as a contractual obligation is that for services rendered and agreed to be paid for; for these services the plaintiff has been paid the agreed remuneration, the legislature has pronounced upon the amount, and this court can have nothing more to say to it. As to the remainder of the alleged contract, it was contrary to public policy *ultra vires* and *void*.

With regard to the petitioner's claim for compensation for discharging the duties of poor commissioner, upon the ground

of an implied contract, arising out of the failure of fulfilment of the terms of his alleged agreement with the Government with reference to the magistracy, we abstain at present from saying whether such a contract can be discovered and defer passing any judgment upon it. Sensible of the hardship upon the petitioner of giving judgment absolutely against him, and thus of casting the costs of these proceedings upon him, and at the same time of the injustice which would arise from the Government having to bear the entire costs when the plaintiff had failed upon the main ground of his complaint, I suggest the payment by the Government of a reasonable sum upon the claim of the plaintiff as poor commissioner, each party then bearing his own costs of these proceedings.

HON. MR. JUSTICE LITTLE:

The real and substantial grounds on which the petitioner rests his claims, and which are supported by his testimony, may be thus summarily stated,—that in the year 1862 he was appointed by the Crown under a regular commission duly issued to him, to act as honorary justice of the peace for the Northern district of this island; and in the year 1882, during the illness of the stipendiary magistrate at Bonavista, an arrangement or agreement was made with him on behalf of the defendant Government whereby, as alleged, in consideration of petitioner agreeing to discharge and perform the duties attaching to the office of stipendiary magistrate for that place, during the illness of the then incumbent, he, the petitioner, was to receive a salary of \$276.66 per annum from the Government, and on the death or retirement of the said incumbent, petitioner was to have a plenary appointment to the office and receive the regular annual salary appropriated thereto by the legislature. That in pursuance of that arrangement he assumed the discharge of the duties of the office and continued to hold the position up to his supercession in November, 1886, by the appointment of Mr. Stabb, who was then commissioned by the Crown as stipendiary magistrate for the locality.

In connection with such office as acting stipendiary magistrate, the petitioner also held the position of poor commissioner for the same period of time, the duties of both offices having been in the past combined and discharged by the magistrate, although it does not appear to have been incumbent on him to do so. In order to devote his whole attention to the duties of

these offices, the petitioner, as he alleges, was obliged partially to withdraw from attending to his profession as a medical man, and lost and parted with a considerable portion of his practice, and consequently diminished and lessened the income which for many years he derived from the practice of his profession in that district. In reference to the arrangement or agreement so alleged to have been made on the part of the Government, the evidence does not show, nor is it assumed by the parties, that any memorandum, in writing, thereof was given to the petitioner, or any letter or communication embodying its details, or referring to it, sent or addressed to him, nor did he receive any commission or authority to assume the functions or discharge the duties of such office; the arrangement was made with him by the then attorney-general and premier. But there is some evidence that a minute of Council was made in reference to petitioner's so acting, and his position was recognized as such by the Government from the time he so assumed the discharge of the duties of the office up to the time he was superceded therein.

At the hearing of the argument it was forcibly urged by the learned counsel for the petitioner that the defendant Government were the original parties to the agreement and should have produced in evidence the minute of Council embodying its terms. Being competent to enter into such a contract they were as amenable and answerable for the breach of it on their part as would be an individual or a corporation under like circumstances; that they were not justified or warranted in terminating it by the dismissal of the petitioner and are answerable in damages for having done so. It was also suggested that the salary received by petitioner did not include any allowance for his labours as poor commissioner. Counsel also referred to the statute on which these proceedings are based and contended that under its provisions petitioner was enabled to claim and seek the relief demanded under his petition.

The acting attorney-general, on behalf of the defendant Government, urged with some force, and was supported with a reference to a few authorities, that no such claim for damages can be sustained or allowed in a proceeding against the Crown of this nature, there being no one authorized to make such a contract on behalf the Crown or capable of binding the Crown under such circumstances. That as to the terms of the alleged agreement the conditions are unaltered; the then incumbent of the office is still living, not retired and unpensioned.

That petitioner acted as stipendiary magistrate at one-third of the salary, and was paid that in full to 1886, when the present officer was duly appointed; that such contract could not be made, there being no power to appoint to minor judicial offices for life or during good behaviour; and lastly, that Candow, the then incumbent, received his full salary, and the amount paid to the petitioner was so paid on executive responsibility.

As to the exception taken and urged by the acting Attorney General as to the form or manner of procedure adopted by the petitioner in advancing this claim and laying his damages as set out in these proceedings on this statute, I cannot see that any grounds exist, either in the statute or the authorities referred to, to sustain the objection so urged. In claims against the Government arising *ex contractu*, or where a claim arises on a valid contract between the Crown and a subject, the right to claim unliquidated damages resulting from a breach of the contract undoubtedly was and may be sustained.

This principle is fully recognized in many reported cases, and, amongst others, in the case of *The Windsor & Annapolis R. Company vs The Queen*, and *The Western Counties R. Company, 11 appl. cases*; also, in *Tobin vs. The Queen, 14 C. B., N. S.*; *Thomas vs. The Queen, L. R., 10, p. 31, &c.* In these and other reported cases of a like character the aggrieved party proceeded by petition of right, theretofore one of the remedies at common law open to a subject who, under certain circumstances, sought relief against the Crown. Under a petition of right, by the 23rd and 24th Vic., chap. 34, the forms of procedure are simplified and to a certain degree assimilated to those in an action between subject and subject. The terms and provisions in our law set out in the 20th chapter of the consolidated statutes, and on which these proceedings are taken, have in like manner extended certain rights of action arising *ex contractu* between the subject and the Crown. The petitioner then being apparently right in asserting a claim for damages in a proceeding of this character for a breach of the alleged contract, we have merely to determine whether the facts established and presented on the record create obligations of such force and effect as in law constitute a binding contract of the nature contended for by the petitioner; or was it competent for the parties referred to in evidence to make the office the subject matter of such an arrangement involving the obligation now sought to be enforced at law against the defendant Government.

In relation to the creation of the offices of justices of the peace and magistrates, we find that it is one of the highest rights or prerogatives of the Crown, and has been there vested by special statute so far back as the reign of Ed. III. And from the history of the offices we find it established by law beyond all question that these officers are appointed by the Queen's commission under the great seal, and Her Majesty may determine the commission at her pleasure, either expressly by writ of *supersedeas*, or impliedly by omitting the name from any commission,—*Ch. Pre.*, p. 80.

This rule naturally follows as a consequence on the equally long established and elementary principle of constitutional law given in *Broom and Hedley's Commentaries on Prerogative*, "that the Queen is not only the chief, but properly the sole magistrate of the nation, all others being by commission from and in due subordination to her"

It will be obvious from the authorities that this right of appointment and the nature of the tenure by which the appointee continued to hold any judicial office was guarded with great and peculiar care, and no infringement on the right and principle would receive recognition when it became the subject of judicial inquiry. We find, for instance, that a Royal grant of a judicial office for life, and which was theretofore granted or held only at will, was declared void.—*Chy Pre.*, 76. The exceptions which are specifically mentioned in authorities as to the lord chancellor and the judges of the courts of common law, only tend to confirm the intention of the Crown to jealously guard the existence of this right in appointments to certain offices, particularly to those of a judicial character.

We find the same prerogative right upheld in the decision of the judges in the chancery division in 1876, in the judgment delivered by the vice-chancellor in *re Tuffnell*. The suppliant in that case was assistant military surgeon on the staff, and proposed in a communication to the secretary of war to forego all future promotion if he received a permanent appointment in a certain military provost prison. This offer was assented to, and the permanent appointment made. But after a few years it was considered by the war department no longer necessary to keep up the hospital, which was accordingly closed and the regular officers retired on half pay. The suppliant thereupon filed his petition of right, and *inter alia*, urged that he was appointed to the charge of the military prison during his life, or until incapacitated by infirmity or misconduct.

It being urged in the course of argument that the petitioner held office upon the same terms which all the offices in the army are held, the vice-chancellor observed "that all appointments are held on the same tenure, judges now alone excepted, who are not removable except on an address from both houses of Parliament," and in the conclusion of his judgment he further observes that this prerogative right "is a power which is always considered to be in the Crown, a rule which has never been departed from, and therefore, on general principles, he concluded the petitioner had no ground of complaint."

And, in further illustration of the principle and powers thus recognized, we find in our local reports the case of *Barnes vs. the Government*, heard and adjudicated on by this court in 1875. In that case a commission issued to the petitioner in 1874, under the seal and signature of the Governor of the colony, conferring on petitioner the office of superintendent of fisheries, which office previously existed and due provision for it had been made by the legislature, the executive Government notified the petitioner of their intention of abolishing the office and declined allowing him any remuneration for his consequent loss. He contended the Crown had conferred upon him a freehold in the office, which he was legally entitled to hold as long as he was enabled to discharge the duties devolving on him satisfactorily and efficiently.

However, this court held that "as to the duration of the appointment * * * seeing that the instructions of the Governor direct that appointments made by him should be during pleasure only, and that it must be presumed (see *ex parte Robertson*, 11 Moore 295), that these instructions have been followed; that the commission contained no express words conferring the office for life or for years * * * The petitioner held during the Governor's pleasure only, and that his interest in the office ceased with the adoption of the minute of Council, &c."

Such then are the principles and rulings laid down by which the privileges of the executive Government and the rights of the subject are circumscribed and governed in the relations created by official appointments under the Crown.

The instructions in this particular referred to in the judgment just quoted were retained in the Royal instructions accompanying the letters patent constituting the office of Governor, &c., of the island under all our constitutional changes; and No. 20 of these instructions reads as follows:—"And we do further direct and enjoin that all commissions granted by our

said Governor to any person or persons to be judges, justices of the peace, or other officers, shall, unless otherwise provided by law, be granted during pleasure only." This power must then be recognized as existing in the executive Government, and it is one which may justly be regarded as arbitrary and one which may be exercised most injuriously to the interests of the officer; but it is observed that such is the benignity and conduct of the Government and of the Sovereign towards all officers that it is never exercised *arbitrarily* or *improperly*, and only when it is necessary in the interest of the public service.

The petitioner now presents himself on the record not as a duly commissioned officer to the position in question, but as one acting without that regular authority, and whether whilst so acting as such stipendiary magistrate, he was doing so lawfully or unlawfully it is now needless to discuss. However, by this arrangement which was stated to be verbally communicated to him on the part of the Government, he was given to understand that on the death or retirement of the then incumbent, he would be confirmed in the appointment by the executive Government, and that such appointment would be of the nature and character as contended for. Such an understanding, on which the contract is attempted to be raised for the future grant of an absolute commission confirming the right to this office, which could only be held during the pleasure of the Crown, could not, I submit, under the circumstances, have any such force or legal effect as that sought to be imposed on it in these proceedings.

The Crown would not be warranted under the law, as by the reference to the authorities appears clear and distinct, in issuing any other commission to such a judicial office than one by which the appointee would hold only during the pleasure of the Crown. And one holding under such a commission and discharging his duties, however satisfactorily, would yet, under the terms of that commission, be subject to the uncertainties of such a tenure. The very nature of such an alleged agreement would, therefore, manifestly conflict with the position and rights of the Crown, as declared by law, and run counter to the terms of the commission of such an official. For his contention would amount to the assertion of a right to the office from which he could not be deprived, and he could not lawfully be relieved of it without being compensated for the loss of his position. This would obviously override and nullify the terms of the commission, and the declared condition on which the Crown can confer it under the law.

At the same time there can be no doubt, from the evidence, of the full faith and reliance held by the petitioner in the arrangement thus entered into, and the ultimate certainty of its being literally fulfilled. And it is very reasonably and appositely argued in urging the point of original participation, in the making of this agreement by the Government, and their liability, that the Executive Government subsequently communicated with the petitioner on matters of official duty and received his regular reports as such acting stipendiary magistrate, and directed him to carry into effect certain orders and public duties, which could only be executed by such an officer. No question has been, even inferentially, raised on the record or in argument, impugning in any manner the conduct of the petitioner in the discharge of the duties and functions devolving on him whilst acting as such stipendiary magistrate, and naturally he feels aggrieved at the condition in which he is placed by the altered intentions of the Government in his behalf.

It is, however, not the province of this court, nor have we the desire or power, to inquire into the motives that may influence or induce the executive Government to adopt the course, or exercise the right, which undoubtedly is possessed by them, but which, the petitioner contends, has been arbitrarily and improperly enforced towards him in this instance.

We have then simply to declare what the law is and apply it to the facts and circumstances presented on the record, and to meet out justice accordingly, irrespective of all other considerations.

It is admitted the petitioner has received the full amount of the stipend which he was entitled to, whilst acting stipendiary magistrate, therefore no further question arises on that point; but the evidence is not satisfactory in reference to the compensation he was to receive whilst he attended to the duties of poor commissioner, although it does appear that the magistrate at all times in that locality attended to and discharged both duties for the one stipend. Still it might be implied that as the stipend paid to the petitioner was to be only one-third of the whole or entire salary usually paid the magistrate, as such, some allowance was intended to be made for the labours and duties imposed through the poor commissionership. The evidence on this part of the claim is not sufficiently conclusive, I therefore refrain from concluding myself from a final judgment on that part of the case.

From a consideration then of the facts and a full reference

to the authorities governing in the application of the law to such facts and circumstances, and in view of the clear principles and rules laid down for one's guidance as to the rights of the Crown and the subject in analogous cases, I regret my inability to arrive at any other decision than one unfavorable to the claim of the petitioner, and award judgment on the main point.

I am, therefore, clearly of opinion that so far as the appointment to the office of stipendiary magistrate relates it could not be made a matter of a valid contract by and between any officer of the Crown and a subject; that any agreement as that alleged would not be of such binding effect as that contended for, and that if the Crown had issued a commission to the petitioner in pursuance of any understanding in the nature of such a promise the appointee could only hold such office during pleasure and would be subject to removal by the Crown without creating any legal liability for damages.

HON. SIR F. B. T. CARTER, C. J. :

The facts connected with this case are set out in the judgments of justices Pinsent and Little, as published, and there is no need to recapitulate them in full. The plaintiff claimed damages for an alleged wrongful dismissal from the office of stipendiary magistrate at Bonavista, which, he alleged, had been promised him when he assumed the actingship of the same office, on the then stipendiary, who was incapacitated from illness, being provided for by pension or on his decease. So acting he discharged the duties, in conjunction with that of poor commissioner, at a comparatively small compensation, under the belief and in consideration that he would have the full appointment when either of the conditions referred to happened, and, besides, sustained serious loss in having to forego practice as a medical practitioner, the better to enable him to attend to the duties of his office; that the then stipendiary had been provided for, and the Government had refused to appoint him, having appointed another person. He claimed to be compensated for his loss as regards that office, and also payment for discharging the duties of poor commissioner. The attorney general denied the existence of any such contract; that the facts set out did not constitute a claim against the Government; and that for services as poor commissioner they were included in those for which the plaintiff was compensated.

The appointment to a judicial office as an acting stipendiary magistrate was rather of an informal character; there was no communication in writing from the Colonial Secretary or other officer of the Government at the time, and no acting commission, but the information of the appointment and promise as to the future relied upon was verbally made by a member of the executive council.

There was no censure or imputation of any kind made on the character or conduct of the plaintiff, and no witness examined on behalf of the Government.

Now, without combating any of the allegations of the plaintiff, and even assuming for the sake of argument they have been proved, how does the law stand in this matter? In this colony, under the royal instructions, the Governor has the right of appointment to all offices during pleasure only, unless otherwise provided by law, and he has also the right, by the same authority conferred on him, to remove or suspend officials. This branch of the prerogative has never been questioned, whether as regards civil, military or naval officers. The Crown has an absolute legal power to dismiss any of its servants on the advice of its responsible ministers. Such a power is indispensable in order to give to the latter that authority over those by whose agency and assistance they carry on the public business, without which they could not justly be held accountable by parliament for the manner in which affairs are conducted,—*Grey Parl. Gort., New Edin., p. 326.* This rule, however, does not apply to offices held “during good behaviour,”—*Brown's Const. Law, 791.*

But, while every government must necessarily possess the abstract right of dismissing any of its servants who may hold their offices “during pleasure,” whenever they consider that such a step is required by the exigencies of the public service, it has, nevertheless, been recognized as a rule that persons holding non-political offices under the Crown should only be dismissed for incompetence or misconduct. Doubtless an active interference in politics on the part of a non-political office-holder would be a case of “misconduct” sufficient to justify his dismissal. If dismissals were to take place by a rival ministry without cause, it would lead to a repetition of extensive and vindictive changes amongst government employees that would prevent the growth of experience in office and destroy the efficiency of the public service.—*Grey Parl. Gort., p. 387; Todd on Parl. Gort., vol. 1, p. 332, U. Seq.* And as to offices of the

army and militia, it was decided in the court of Queen's Bench, 3 F & F, 527, that the discretionary power of the crown to remove such officers is so absolute that even if an officer has been tried by a court of inquiry and acquitted, the crown was justified in removing him from office upon the advice of a minister responsible to parliament.—*Dickson vs Viscount Combermere and others*.

In the present case there was no appointment made or commission issued to the plaintiff, and we may rest assured if there had been, especially where a judicial office of importance was concerned, the Governor, for the time being, would not be a party to dismissal unless, to repeat the words of the royal instructions, there was "sufficient cause to him appearing." All this authority of the crown was well considered by the learned and able judges of our supreme court, who decided in the case of *Barnes vs. The Government*, that the plaintiff (the occupant of an office under a warrant or commission) held it during the Governor's pleasure only, and was liable to be dismissed at any time without claim for damages. In that case the office was abolished as unnecessary.

I considered this matter throughout, as I think we all did on the bench, so perfectly clear in principle as to be needless to cite a single case beyond the last; but I thought with all the unquestionable abstract right of the crown to dismiss, it was advisable that the practice in this respect under parliamentary government should be made generally known in this colony; and besides I thought it was due to the counsel for the plaintiff, who relied on a right of action in damages for breach of the alleged contract, to refer to a case recently decided by the House of Lords, where that was made as in this case the chief point of contention—*De Hoshé vs The Queen*, 3 L. T., Rep. 114. It was the case of a military officer; the substance of the decision is: "It is the prerogative of the crown to dismiss any military officer at pleasure, and no contract can be made to bind the crown in derogation of such prerogative." The Lord Chancellor said, "Assuming a contract had been made, and then the insertion in the contract of a right to serve the crown for a particular period, he thought it would have been unconstitutional and contrary to public policy that such a contract should have been maintained." "Any such contract must be subject to the right of the crown to dismiss." I may observe, this decision was given on demurrer to a petition of right.

The same observations are equally applicable to this case, if even a formal contract had been entered into. If the crown had, in the exercise of the prerogative for public interests, to pay in damages on dismissal as with any ordinary employer of a servant, the prerogative would exist in name only. All the judges agreed, before any judgment was delivered, that the question of compensation for services as poor commissioner should for the present not be finally pronounced upon, in the hope that some satisfactory arrangement might be arrived at between the parties.

Sir W. V. Whiteway, Q.C., for plaintiff.

The Attorney General for defendant Government.

TRUSTEES OF FINLAY v. FINLAY.

1888, *February*. CARTER, C. J.; PINSENT. J; LITTLE, J.

Will—Estate for life—Remainder vested, subject to be contingent—Insolvency—What property passes to trustee.

Where a devise of land and dwellings was made by a testator to his wife, for the term of her natural life, (the subject matter having been already conveyed by deed to the same effect), and the reversion and remainder to his son, in the event of his surviving his mother; the son became insolvent and his assets passed to his trustee. Some time after the declaration of insolvency his mother died, and the trustees of his insolvent estate claimed that his reversionary interest in the property vested in them on death of mother. It was contended for insolvent that at date of insolvency no interest had vested in him, but only an expectancy.

Held—That at date of insolvency the insolvent had a contingent executory interest—a *quasi* contingent remainder, a saleable and assignable interest in property—and could have sold out and released the reversion, and that this asset passed to the trustees of his insolvent estate.

THIS is an action of ejectment for the recovery of a parcel of land with dwelling house and appurtenances, situate on the north side of Circular road, near St. John's, which is submitted for the decision of this court upon certain admitted facts, which may be summed up as follows :

The late Mr. Jabez N. Finlay, father of the defendant, was the proprietor of the premises in question, and by deed poll, bearing date 19th June, 1880, assigned the same to trustees for the use and benefit of his wife, Mrs Elizabeth Sarah Finlay,

during her natural life; but, if she should die before him, then the said property should revert to him and be at his disposal, and the said instrument of assignment should be void. Mr. and Mrs. Finlay continued to reside on the premises until the time of his death, which occurred about January, 1883, Mrs. Finlay survived her husband, and thus the reversionary clause became inoperative. The said Jabez N. Finlay made his last will on the 29th November, 1882. By it the trustees named in the recited deed poll were appointed executors, and received probate from this court. By the first clause of his will he bequeathed to his said wife the aforesaid premises "during the time of her natural life," and, after making other bequests, by the eighth clause he bequeathed as follows: "Should my said son, Frederick William Finlay, (defendant), survive his mother, I will and bequeath to him the residue, reversion and remainder of my estate, right, title and interest in and to the dwelling-house, land and premises upon Circular road, hereinbefore referred to; but should my said son die before his mother, the absolute title to the said dwelling-house, land and premises shall vest in her." Mrs. Finlay died on or about the 9th July, 1887, up to which time she continued in the occupation of the premises, as apparently she had a right to do under both instruments. The defendant, Frederick Finlay, was, in or about November, 1886, declared insolvent, and the plaintiffs were appointed trustees of his estate, which estate is not yet wound up. A certificate of insolvency and final discharge was granted by this court to the defendant on the 28th May, 1887. Since Mrs. Finlay's death no title deeds of the land in question have been made by the executors to the defendant, but he has, to the knowledge of the executors, lived in the dwelling-house upon the said land, and used the premises ever since the death of his mother, and still lives there without being in any way interfered with by the said executors; he has also received for his own use, from parties who were at and after the decease of his mother lodgers in or sub-tenants of parts of the said house, the amounts due for such lodging or sub-tenancy. No attempt was made by the trustees to dispose of interest, nor demand made during lifetime of Mrs. Finlay. This proceeding to be regarded without prejudice to the claims or rights of the executors of the said late Jabez N. Finlay, or the estate of the said Mrs. Finlay, mother of defendant.

The question raised by the parties for the decision of this court is whether, in view of the said deed and will and of the

facts above set forth, the plaintiffs have any, and, if any, what right or interest in the said land and premises.

Mr. Kent, Q. C., for the plaintiffs, contended that the defendant had a vested interest in the property in question, as from the death of the said testator, which made it assets of his insolvent estate, and as such it vested in the plaintiffs' trustees, and their right not altered because not having dealt with it,—cited *Tull vs. Jacobs*, 3 L. R., Chcy., Div. 703; *Muskett vs. Eaton*, 1 L. R., Chcy., Div. 435; *Simmons vs. Cook*, 29 Beav., 455; *Smith vs. Palmer*, 7 Hare, 228, 1 M. & A., B. K. Cr., 804; *Fearne on Con., Remainders*; *Williams on Exs.*, 6 ed., 1137.

Mr. Emerson, for defendant, contended: (1) The property had not vested in defendant; (2) If there were any interest in defendant all that the trustees could claim would be the value contingent on defendant's surviving; (3) Even as to that it should have been disposed of before it became vested in defendant. He did not cite any cases.

By the Colonial Insolvency Act, chapter 90, consolidated statutes, when a trustee is appointed the estate and effects of the insolvent by rule or order vest in him, but there is no definition, and never has been of which I am aware, in any insolvency Act applicable to this colony, of "estate and effects," as there is in the English Bankruptcy Acts, of the property made available for the payment of creditor's claims. By the latest Imperial Act, 1883, the property divisible comprises "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge"; the meaning of property is further explained in the interpretation clause. Long prior to that are several acts upon the same subject relating to bankrupt estates, and which are quoted as authorities in the case of *Higden, et al vs. Williams*, 3 Pr., Wms. 132, which may be relied upon for the plaintiffs. In that Lord Chancellor King decided an appeal that where a testator devised an estate to his daughter for life, then to trustees to be sold, and the monies arising by the sale to be divided among such of his daughter's children as should be living at the time of her death. A son, a trader, became bankrupt, commissioners assigned over all his estate. Bankrupt got certificate allowed, then his mother died. Held that the son might, in the mother's lifetime, have released this contingent interest, so that the commissioners, by virtue of the Act 13 Eliz., cap. 7, sec. 2, which enacts "that the commissioners shall be empowered over all, that the bankrupt might

depart with all," were enabled to assign it, and consequently the assignees shall be well entitled. Reliance was also placed on the word "possibility," as regards estate in all the statutes regarding bankrupts, the words of the 5th Geo. 2, cap. 30, are "all such effects of which the party (bankrupt) was possessed or interested in or whereby he hath or may expect any profit, possibility of profit, benefit or advantage whatsoever." I may here mention the case of *Carleton vs. Leighton*, in which reference is made to *Moth vs. Frome*, Amb. 394, which decides that the expectancy of an heir presumptive or apparent, a bankrupt, the ancestor living at the time of bankruptcy and assignment, would not pass a right to the property which might subsequently descend to the bankrupt.

If, in this case, the insolvent Finlay had a vested interest, although not in possession, I should have no doubt the property in question would pass to the trustees, even if contingent and subject to be divested, such as *Muskett vs. Eaton*, 1 L. R., Ch., D.; *Smith vs. Palmer*, 7 H., 288; *Simmons vs. Cook*, 29 Bear., 455. Finlay's right in interest was dependent on his surviving his mother, and he had no transmissible right until after her death; besides the life estate she had the reversion in fee had she survived. To the vesting of interest in Finlay there was a condition precedent, viz, the death of his mother, but in the cases cited the condition was subsequent, such as in conditional gifts, "vested subject to be divested." It is a rule in bequests of personal estates, if the gift and direction as to the payment are distinct, the direction as to the time of payment does not postpone the vesting; *Bartholomew's Trusts*, 1 Mac. & G., 355; *Lister vs. Bradley*, 1 Har., 12; *Hawkins on Wills*, 226. This court will take judicial notice of its own proceedings, and we know that no claim prior to the death of Mrs. Finlay was made by the trustees to this property, nor was it referred to in the schedule, or in any way before the court insisted upon; it should have been when the insolvent applied for his certificate of discharge, which he received from this court without protest on this account from the trustees. Some weeks afterwards Mrs. Finlay died. After that is first heard of this claim, and there could not have been any secret as regards Finlay's position with this property. We may infer that the English statutes to which I have referred would not have been passed with their specific terms if they had not been deemed necessary to transfer all contingent and possible interests for the benefit of creditors, having at the same time some

regard to the temporary maintenance of the bankrupt. Reference was made by the defendant's counsel to the distinction between insolvency and bankruptcy, but I cannot perceive that that can have any bearing on this question, nor did he give any reason for the distinction. For some time past all the jurisdiction of courts for relief of insolvents, has been transferred to the court of bankruptcy, London.

Having all due regard to the interests of creditors, we must not forget that this is an action of ejectment, in which the plaintiffs must recover on the strength of their own title. I am of opinion the defendant is entitled to judgment as our insolvency law now stands.

This is a case in which we may conscientiously differ in opinion. The Insolvency Act requires several amendments, and I hope the legislature will remove all doubt by defining the character of the property to be vested in trustees which I have shewn to have been the course of legislation in England from early dates.

HON. MR. JUSTICE PINSENT:

THIS is an action of ejectment brought to recover possession of land, dwelling house and premises, situate on Circular road, St. John's.

The facts have been stated by way of special case for the determination of this court.

The defendant was declared insolvent in November, 1886, and the plaintiffs were appointed trustees to his estate.

The defendant obtained his certificate of insolvency and final discharge in May last.

At the time of the declaration of insolvency, the defendant's mother was living.

Between that time and the granting of the certificate, she died.

At the time of her death, and since the decease, in January, 1883, of her husband, the late Jabez N. Finlay, (defendant's father), Mrs. Finlay had occupied the property, the subject of this action.

The property had, in June, 1880, been assigned by her husband to trustees in trust for her use and benefit, during the term of her natural life, with reversion in the event of her death, in his lifetime, reserved to himself, the conveyance mak-

ing no provision for the devolution of the property after her death, in the event of her surviving her husband.

Mrs. Finlay did survive him, and the effect of the deed seems to me to be that the reversion of which J. N. Finlay had made no disposition by that conveyance, remained in him, to be disposed of by his will, if he were to leave one, or otherwise to devolve according to law.

Mr. Finlay did leave a will, executed in November, 1882; and thereby, amongst other things, and by the first clause of the will he bequeathed the property, the subject of this action, to his wife for the term of her natural life.

This bequest was, of course, inoperative, as its subject matter had already been conveyed by deed to the same effect.

By the 8th clause of his will, however, the testator disposed of his reversionary estate in that property, in these words, "Should my son, Frederick W. Finlay, survive his mother, I will and bequeath to him the residue, reversion and remainder of my estate, right, title and interest, in and to the dwelling house, land and premises, upon the Circular road, hereinbefore referred to, but should my said son die before his mother, the absolute title to the said dwelling house, land and premises, shall vest in her."

No interest in this property had been included in the defendant's schedule of assets at the time of the declaration of insolvency, nor was attention drawn, or claim made to it in any way by the creditors or trustees. Mrs. Finlay, as I have observed, was then in possession. The defendant has been allowed from the death of his mother to the present time, to occupy the premises and to receive rents, and no claim upon the property as part of the insolvent estate of the defendant was made by his trustees until sometime after his mother's death.

The plaintiffs (the trustees) now say that they are entitled to this property, that it has with the death of Mrs. Finlay vested in them in remainder, as it would have done in F. W. Finlay had he not been declared insolvent.

The defendant's position is that he had no right of property in the premises at the time of the declaration of insolvency, but only a possibility or expectancy; that the future interest had not vested in him, and that consequently the property formed, and now forms, no part of his insolvent estate and effects divisible amongst his creditors.

I am of opinion that at the time of the declaration of insolvency, the defendant had in this property a contingent execu-

tory interest. He had, subject to the event of his surviving his mother, his father's reversionary estate in this property, in other words, a contingent quasi remainder in himself by virtue of the bequest in his father's will.

He thus had, prior to the declaration of insolvency, a saleable and assignable right of property, in so much that he could have released the reversion or contracted to sell out, and divest himself of his future interest, an interest which, if he survived his mother, would vest in possession in him upon her death, and if he had disposed of it by sale and assignment his assignee would have become entitled to it.

If this position be correct, it follows, and is clearly demonstrated, that the defendant's interest was an asset of his insolvent estate, and vested in his trustees, to whom it must now belong.

It is true that the local law relating to insolvency makes no provision for after-acquired property; that a declaration of insolvency only vests in trustees the estate and effects of the insolvent then belonging to him; that effects subsequently acquired are, until the granting of the certificate, open to proceedings by unsatisfied creditors, and that to apply them in distribution, new proceedings in insolvency would require to be taken.

The property in dispute in this case is not after-acquired property in that sense, it had been acquired in interest, altho' not vested in possession at the time of the declaration, and therefore as an equitable asset vested in the trustees of the defendant's insolvent estate and effects.

Mr. Justice Story, in his work on equity jurisprudence, appears to me to express the true position of the plaintiff's claim in this case in clear and simple terms, thus: "Contingent interests and expectancies may not only be assigned in equity, but they may also be the subject of a contract, such as a contract of sale when made for a valuable consideration, which courts of equity, after the event has happened, will enforce." therefore, a contingent legacy which is to vest upon some future event, such as the legatee's coming of age, (or, as in this case, his surviving his mother), may become the subject of an assignment or a contract of sale."

Here there was no assignment or contract of sale on the part of the defendant, but there was that which amounts in law to the same thing—assignment by operation of law through the vesting of the defendant's interests in the trustees of his insolvent estate upon the making of the vesting order.

No objection has been taken that, in the absence of some such local enactment as the Imperial Act 8 and 9 Vic., chapter 106, or otherwise, the interest in the property, the subject of this action, was an asset of an equitable rather of a common law character, and that the remedy might be strictly on the equity side of the court or by order in insolvency, and not in ejectment.

It is unnecessary, therefore, to decide whether such an objection could be taken with effect under the chapter "Of Insolvency" of the consolidated statutes, by a party in possession as against the trustees of his insolvent estate, who are entitled to and in whom vest all his estate and effects.

I gather that the parties to this action have stated this case with a view of determining the ultimate right of property, irrespective of any technicality of this kind.

So regarding this case, I am of opinion, in giving judgment for the plaintiffs, that, as its determination has been for the benefit of the insolvent estate, all the costs and expenses of this litigation should be borne by the insolvent estate.

HON. MR. JUSTICE LITTLE:

In this matter proceedings originated in an action of ejectment, brought by plaintiffs against defendant, to obtain possession of certain land situate in St. John's, and by arrangement by the parties and their counsel the contentions which would arise in that action were agreed to be submitted to the decision of this court, in the form of a special case.

From the record embodying this special case, and from the statements of counsel on the arguments and hearing in support of the respective claims of the parties, it appears that the late Jabez N. Finlay held and was possessed in the fee-simple of the parcel of land and premises in question, and in June 1880, executed a deed whereby he assigned the same to certain trustees for the use and benefit of his wife during her natural life. The deed provided that in the event of Mrs. Finlay dying before the grantor, the land was to revert to him. Mr. and Mrs. Finlay occupied this land and premises up to January, 1883, when he died, leaving a will, and the widow continued in the occupancy of the land up to the time of her decease in July, 1887.

The testator, by his said will, bequeathed the said lands and premises in the terms and manner following, that is to say:

1st. "To my beloved wife, Elizabeth Sarah Finlay, I give and bequeath the land, dwelling-house and premises, now occupied by me, and situate on the Circular road in St. John's aforesaid, to hold the same during the term of her natural life."

And by paragraph eight, that

"Should my said son, Frederick William Finlay, survive his mother, I will and bequeath to him the residue, reversion and remainder of my estate, right, title and interest in and to the dwelling-house, land and premises upon the Circular road, hereinbefore referred to; but should my said son die before his mother the absolute title to the said dwelling-house, land and premises shall vest in her."

It further appears that testator's said son was declared insolvent in the month of November, 1886, and the plaintiffs were duly appointed trustees of his insolvent estate, which is as yet not wound up. In May, 1887, the insolvent obtained his certificate and final discharge from this court. No title deed of said land has been made by the executors to him, but with their assent he has continued to occupy the dwelling-house and land, and received the profits thereof, and no attempt was made by the trustees in insolvency to dispose of the interest, or any demand made in relation to it, during the lifetime of Mrs. Finlay.

On the argument counsel contended on behalf of the plaintiffs, that the defendant, on the death of his father, took a vested interest in the land in question, and having such interest it passed to his trustees on his insolvency, and that it was more than a contingent interest; that it was vested and merely subject to be divested, and the fact of the trustees not having dealt with it did not alter their position towards it, and they were at liberty to deal now with it as they found it. The executors had impliedly and tacitly assented to the bequest, &c.

On the part of the defendant it was urged that up to the adoption of these proceedings, no attempt was made by the trustees to assert any claim to or question the rights of defendant in this matter, nor any attempt to sell or dispose of any such alleged interest on their part, and that no vested interest was in the defendant at the time of his insolvency, nor until some time after he obtained his certificate and final discharge from this court; that the wording of the will would only give an equitable interest, and the utmost the plaintiffs could claim is the amount that interest was worth at that time contingent on the death of the mother. The language to create such a vested interest as that contended for should be expressed with certainty.

The question then submitted for the decision of the court is, whether the trustees of the insolvent estate of the said F. W. Finlay, in view of the said deed, will, and of the facts set out, have or had any rights or interest in or to the said land and premises?

The contention thus arising as to the construction to be placed on the terms of the will, and the nature of the interest thereby conferred in or to the land in question, may have been at first regarded as one of a very ordinary or simple nature and of easy solution; still it has been found to be involved in some difficulty, and called for much research and consideration. And notwithstanding the light in which one may have at first viewed the respective claims of the parties, as presented at the argument, the result of references to authorities and of maturely considering them in their application to the facts on this record, finally lead me to a conclusion favorable to the claim of the plaintiffs.

This is an interest in a *chattel real*, and as we find it laid down (*Ferne, v. 1, p. 4*) that such chattels are susceptible of limitations over after a disposition of them for life; and further, it is well recognized that the rule regulating the validity of freehold interests in land is equally applicable to bequests of chattel interests, and the same rule of construction applies to personal as to real estate, there can therefore be no question that the general principles recognized in the adjudicated cases which may be referred to, may be applied in determining on the rights of the parties to these proceedings.

On reviewing the facts, it appears that the late Jabez Finlay was possessed in fee-simple of certain land and premises in St. John's, and assigned them (as set out) to trustees for the use and benefit of his wife during her lifetime only; that there was then reserved to himself, and still resting in him, the right of granting or disposing of the remainder of his interest therein. This right he exercised by the making and execution of his last will and testament, by and under which he declared in the terms already stated that the remainder or residue of his (testator's) interest should belong to his son, the defendant, if he survived his mother, but if not—that is, if he predeceased her—then the absolute title should vest in her.

Now, it is well understood that in expounding a will the question is not what the testator meant, but what is the meaning of his words; to prevent speculations upon what the testator may be supposed to have intended the true question is, what that which he has written means.—2 *Ws. Exs.*, 1082.

Are these words, or the terms thus used in the will, open to the construction contended for by the plaintiffs, or are they subject to the qualified construction of the defendant?

To determine this we must refer shortly to the principles and to cases of authority bearing on the matter, and it is needless to observe that it is seldom possible to find a case agreeing in every particular circumstance with that to which one desires to apply it by way of analogy.

As to the force of the words used and the rights raised by their terms in creating any vested interest in the land in the defendant during the mother's lifetime, we find it stated in *Ferne on Remainders*, that a vested interest may frequently be unattended with the right of possession or enjoyment, since that right may reside in some other person than the individual having such vested interest; and again, possession may be executory, as in case of a remainderman or reversion, during the continuance of the particular estate.

And in principle the law favors the vesting of estates, if words of futurity are introduced into the gift; the questions arises whether the expressions are inserted for the purpose of postponing the vesting or point merely to the deferred possession or enjoyment—*Jur. Wills, vol. 1.*

Thus in *Barastows* case there was a devise to A. and B. for years, then to testator's executors till such time as H. should attain 21 years, and when he should come to his full age, then to him absolutely. It was contended the remainder did not vest in him unless he attained the prescribed age; but the court held it to be vested immediately. * * The adverbs of time, when, etc., did not make anything necessary to *precede* the settling (*i.e.*, the vesting) of the remainder, but merely expressed the time when it should take effect in possession. The words "from," "after," and "should," are similarly construed.

The rule of construction appears to be as reasonably applicable when the contingency is that of the devisee being alive when the remainder falls into possession, as where it is the attainment by him of the age which presumably in the testator's mind qualifies him for the possession and legal control.—*Jur. W., p. 810.*

In *Festing vs. Allen*, 12 M. & Wels, Rolfe B. observed on the case of *Phipps vs. Askens*, and the cases there referred to, that in these there was an absolute gift to some ascertained person or persons, and the courts held that words accompanying the gift, though apparently accompanying a contingency or contin-

gencies, did in reality only indicate certain circumstances, on the happening or not happening of which the estate previously vested should be divested and pass from the first devisee into some other channel.

This rule of vesting only yields to a clear contrary intention from the language of the will; the mere introduction into an ulterior gift of new words of disposition has no effect in postponing the vesting.—*Benyon vs. Madison*, 2 B., Cc. 75.

In *Harrison vs. Foreman*, 5 Ves., 207, where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moities, and in the case of the death of either of them during her lifetime, then to the one surviving on her death. Both died during her lifetime. *Sir P. Arden, M.R.*, held that the original gift was not defeated. And further, we find in *1 B. & P. N. R.*, 324, a case in which lands were conveyed to the use of the grantor himself for life, and after his decease to the use of his son for ever, should he attain 21 years; but if he died before he attained that age, then the land and premises were to remain to the grantor in fee. It was held that, though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to the son, subject to be defeated upon a condition subsequent.

Now it is unnecessary to multiply cases in further illustration of the principle started with, as it appears to me that there cannot be a doubt that under the terms here used the defendant, in the legal sense, did take a vested interest in the land in question during the lifetime of the mother. It was a devise to her for life, and if her son (the defendant) should predecease her, it became absolutely her freehold; but otherwise, if he survived, then he fell into possession; and in the meanwhile he was seized of his remainder at the same time that she became possessed of the interest for life under the will.

The defendant's estate in the land were then limited to take effect and be enjoyed after the particular estate in his mother was determined, the latter was in possession and the other in expectancy. They were only different parts of one estate of freehold which existed in the testator, created at the same time and subsisted together after his death in the widow and the defendant. The defendant then had a vested right or interest in and to this land during the life of his mother and at the time of his insolvency, which interest was subject to be divested by the occurrence of the contingency of defendant's death in

the lifetime of his mother. It appears this right or interest was not brought into question at all on the defendant's examination in insolvency. We find that under the English insolvency acts such property as the insolvent was entitled to, both at law and in equity, vests in the assignees.—*Walfd. Ps. to Ac., v. 2, 1300.*

A contingent legacy which is to vest upon some future event, such as the legatee's coming of age, may become the subject of assignment, or of a contract of sale; so even the naked possibility of expectancy of an heir to his ancestor's estate may become the subject of a contract of rule or settlement, * * * and no distinction exists or has been taken between assignments of a possibility of an inheritance and assignments of a possibility of a chattel real.—*Trull vs. Eastman, 3 Met. 121; Watherd vs. Watherd, 2 Sim.; Robson vs. Trevor, 2 P. Ws., &c.*

And in *Montague & Ayerton's Bcy Reports*, referring to the English B'cy Acts (1 and 2 W. 4, c. 56; 6 Geo. 4, c. 16), that the commissioners would assign the bankrupt property, viz.: all present and future personal estate, all property which may revert, descend, devised, bequeathed, or come to him, etc.

The case of *Heydon et. al. vs. Williamson*, reported in 3 P. Ws., is very much in point and fully illustrates the principle determining the position in which such interests and estates were regarded in the application of the provisions of the English bankruptcy acts. In that case there was a devise to the children of A. as should be living at his death. A. had issue, a son B., who becoming bankrupt, got his certificate allowed, after which A. (the father) died; it was held that this contingent interest was liable to the bankruptcy, for as much as the son in the father's lifetime might have released it.

In the application of such ruling to the questions arising on these proceedings, our laws of insolvency in this particular do not conflict with the provisions of the English bankruptcy laws, for in both instances it is a then present and existing interest that is being passed upon. In this case the defendant's then interest might have been charged, assigned or released by him, but being still in him at the time of his insolvency, it must pass to his trustees.

The Act of 5 G. 4, cap. 67, and the local Act 25 Vic., cap. 7, which preceded the present law regulating our practice in insolvency, used the general and comprehensive terms of "the insolvent's estates and effects," "property and assets," &c., in designating that which belonged to the insolvent at the time

of his insolvency, or passed to the trustee, and the same general and inclusive terms are still preserved in our statutes. It may here again be observed that if it were disclosed at the insolvent's examination that he was possessed of such a right and entitled in remainder, his *then* interest would, under the directions of the court, be entered in the schedule of his assets, as the terms of the statute would have required it, and in the interests of the creditors no other course would be warranted. The interest in this vested right might not then have been considered of any great value, and probably would have been dealt with by the trustees at a valuation greatly below that which it has since acquired by becoming vested in possession. Indeed, we find that means, novel to us, are elsewhere resorted to, under certain circumstances, to secure the value of this reversionary interest against such a contingency as the death of the remainder man in the lifetime of the party having the particular estate. For instance, we find such an interest recently the subject of adjudication under circumstances somewhat similar to the present and in which the spirit and intention of the law and the leaning of courts are indicated as strongly conservative of the rights and interests of creditors in bankruptcy and insolvency proceedings. The proceedings referred to were passed on in May last in a case heard in the Court of Appeal in *ex parte Board of Trade in re Block*. It appeared there was an asset belonging to the bankrupt Block consisting of a reversionary interest in £2,000, contingent upon Block surviving his mother; and in order to effect a sale of this interest the trustees, with a view to its realization at better advantage, called on Block to sign a requisition and submit to medical examination, so as to enable the trustees to effect a policy of insurance on his life; Block refused. The majority of the court, without questioning the vested right, held they had no power to oblige the insolvent to submit to the examination. But C. J. Fry, in expressing his dissent from the ruling, observed *inter alia*, "The property depends on the life of the bankrupt; it is property which can be realized for a *larger sum* if the contingency on which it depends can be filled up * * * it seems to me shocking that a bankrupt can thus deprive his creditors of a valuable asset. The property of a bankrupt ought to be realized so as to produce the largest amount, &c., and the way to do that is by effecting a policy."

Reference might also be made to the case of the payment of a legacy before bankruptcy, and payable after was held to vest in the parties' trustees,—*2 Vem.*, 432.

I am, therefore, of opinion that defendant had a vested interest or right to the land in question immediately on testator's demise, and that such a right passed to his trustees on his insolvency, and when the death of the widow occurred such interest became vested in possession, and consequently enures to the benefit of the creditors of the estate of the defendant.

I cannot hold that because of the question not having been raised on the defendant's examination at his insolvency, or at the time of applying for his certificate, that we would be justified either in law or equity in holding that the creditors thereby estopped themselves from asserting their right to the interest their debtor then had in the land on subsequently ascertaining what their rights were in the premises.

Mr. Kent, Q. C., and Mr. Horwood, for plaintiffs.

Mr. McNeily, Q. C., (acting Attorney General), and Mr. Emerson, for defendant.

CORBETT v. FOOTE.

1888, *March*. LITTLE, J.; CARTER, C. J.; PINSENT, J.

Practice—New trial—Verdict against evidence—Principle on which new trial allowed.

The plaintiff sought to recover \$900, balance of account covering several years transactions. The defendant counter-claimed for proceeds of certain shipments of produce not accounted for. Plaintiff answered counter-claim that produce had been shipped to a firm which became bankrupt before proceeds were accounted for. The defendant answers that plaintiff was not their forwarding agent; that the produce was shipped to plaintiff's own account; that proceeds entered into account between plaintiff and the bankrupt firm; and that the commission charged by plaintiff was a *del credere*. The jury found a verdict for defendant, disallowing his counter-claim. Upon a rule for a new trial on the grounds, (1) Verdict contrary to evidence; (2) Mis-direction; (3) Non-direction.

Held—(Pinsent, J., differing)—A new trial ought not to be granted on the grounds that the verdict of the jury was contrary to the weight of evidence, unless the verdict was one that the jury, weighing the whole of the evidence reasonably, could not properly find. Rule discharged.

THIS cause was tried before me and a special jury in the last term of this court, and resulted in a verdict for the plaintiff. This verdict the defendant now seeks to have set aside on the grounds that it was contrary to evidence and also for misdirec-

tion in the law laid down by the judge in leaving the case to the jury. The rule nisi, granted defendant, has been fully and ably argued, and it only remains for us to decide if the grounds relied upon by defendant are such as will justify the court in making that rule absolute.

The history of the proceedings as presented on the record shows that the writ in the case was issued in September, 1884, and under it the plaintiff claimed \$961, under the common indebitatus counts, in assumpsit, for goods sold and delivered, &c., to which the defendant in December, 1884, appeared and pleaded the general issue only. A commission issued for the examination of the plaintiff, at Halifax, and on its return and after the case was fixed for trial in November, 1886, on the application, defendant was permitted to file other pleas by way of set off and counter claim, and by and under these he formally alleged that the plaintiff acted as his agent and became personally responsible for the price of all goods sent to him by defendant for sale, and also undertook to fully account for the proceeds of such goods; in effect it was alleged plaintiff was to receive and be allowed a commission *del credere*; under these pleas the defendant claimed the sum of \$2060, being the alleged value of forty-two cases of lobsters shipped to the plaintiff, and consigned by him in his own name to Carvell & Company, of London, for sale, who, becoming bankrupt, failed to make any return therefor, and the value of said goods was consequently lost to the defendant. Issue was joined on these pleas and owing to change in pleading, and the claim thus set up, it became necessary to issue a second commission for the further examination of parties abroad, and on its return the case was tried with the result before stated.

From the evidence thereupon presented, it appeared that plaintiff was a commission agent at Halifax, and also acted as agent for certain steamers, one of which plied between Halifax, St. Pierre and Fortune Bay in this island.

The defendant was carrying on the business of a lobster packer and trader, at Grand Bank, in Fortune Bay.

The amount of the claim sued for by plaintiff was, as stated, \$961, and is not now disputed, but the defendant, under his counter claim, seeks to recover the difference between that amount and the value of the lobsters so transhipped to Carvell & Company, and which were in their possession at the time of their bankruptcy. These lobsters were of the value set out in the pleadings, and defendant contends he is entitled thereto,

because of plaintiff's alleged liability as his agent acting under a *del credere* commission.

The case is one involving no intricate or difficult questions of law, and one in which the consideration and judgment of such a jury on the facts and circumstances as set out in the evidence, might be relied upon as justly determining the questions at issue between the parties.

As the principle and only point on which the defendant's contention rests in support of his counter claim is, that the plaintiff acted as an agent for and under a *del credere* commission, we must refer shortly to the legal requirements necessary to constituting such an agency. We find it laid down in *Story on Agency*, p. 404, that besides the ordinary commissions in some classes of agency, such as cases of factors for the sale of goods, extraordinary commissions are sometimes allowed, either by the *usage of trade* or by the *positive agreement* of the parties. Of this character is what is commonly called a commission *del credere*, which is an extra compensation paid to a factor, in consideration of his undertaking to be responsible for the solvency and punctual payment of the debt, by the parties to whom the goods of his principal have been sold. The phrase *del credere* is a borrowed one, and its signification is exactly equivalent to our word *guarantee* or *warrantee*; and in the case of *Morris vs. Cleasby*, 4th *Maulc and Selwin*, Lord Ellenborough observes that in correct language a commission *del credere* is the premium or price given by the principal to the factor for a guarantee; it presupposes a guarantee; and in the case of *Grove vs. Dubois*, 1, *T. R.*, 112, Lord Mansfield is stated to have laid down that a commission *del credere* is an *absolute* engagement to the principal from the broker or factor.

Now these references are quite sufficient to establish the primary principles which must be applied to the evidence in deciding on the claim of the defendant; and the burthen of proof, I take it, rests on him in support of this part of his defence.

It may be as well then to give the evidence by force of which he contends this responsible and onerous position is imposed on the plaintiff as his agent.

The only witness examined on the part of the defence (aside from the two hereafter referred to) was Thomas Foote, son of defendant, whose evidence principally went to show that defendant commenced in 1881 to transact business on his own account with plaintiffs; before that he and one Mitchell were partners in lobster packing and did business with him. He

states: "We bought goods from plaintiff and sent him lobsters to pay for them." In the latter part of 1882 defendant sent him the 412 cases said to have been forwarded to market, the proceeds of which have not been accounted for.

Witness could not say he was personally acquainted with defendant, but saw him at Halifax in 1881 and gave him an order for some goods, and was not aware of the existence of any such firm as Carvell & Sons until their failure; knew neither who the actual sellers or purchasers of the lobsters were at the time.

After the lobsters would be shipped to Corbett, defendant had no further connection with them; the next we would hear of them would be we got so much for them and it would be passed to our (defendant's) credit. There were no orders given for the shipping or sale. Plaintiff said nothing about not being responsible until after Carvell's failure. * * * We now send lobsters to C. T. Bowring, Liverpool, through St. John's, and get account sales that show the sales to be on account of Morgan Foote, and pay $2\frac{1}{2}$ per cent. We now deal with Bowrings, and are supplied by them and carry on a general trade and business. We were in the habit of getting account sales from plaintiff shewing the goods went to England. We were nine years doing business with him.

The defendant was not examined as he might have been, and this evidence of his son comprises the sole direct testimony given in support of the defence and this counter-claim. Beyond this the defendant relied on inferences to be drawn from the contents of certain exhibits which, it appeared, were furnished by the plaintiff at Halifax, and, as part of his evidence, were returned with the commissions. The only further evidence for the defence was that given by Messrs. Bowring and McDougall, the former went to show the rate of commission charged by the consignees at Liverpool on certain shipments of lobsters recently sent by him on account of defendant, who is now dealing with him. This rate was $2\frac{1}{2}$ per cent. on sales. Mr. McDougall's testimony showed he had made a shipment to his consignee at Liverpool, and the commission charged was three per cent., including guarantee.

This evidence could not be intended to apply in proof of a usage of trade existing at the places or ports where the transactions involved in these proceedings transpired, for this and other reasons was not, in my opinion, relevant to the matters in issue.

Under the commissions the plaintiff deposed that his first business transaction with defendant, alone, was in 1880, and continued up to 1883; he at first dealt with defendant as member of the firm of Mitchell & Foote in 1878, and down to their separation, and subsequently with him alone. Defendant's son conducted the correspondence with plaintiff, and visited Halifax and transacted business there with him. When the firm of Mitchell & Foote commenced to send lobsters to Plaintiff he made an arrangement with Mitchell at Halifax, that "he, the plaintiff, was to receive the goods, pay all back charges, insurance, &c., and forward to London to the best market, pay the selling commission and charge them five per cent. on the sales; that on two occasions he was charged in London five per cent. commission for selling; that he never bought, sold, or dealt in lobsters excepting acting as agent, forwarding the goods for sale, and acted in that way for Atherton, Hughes & Co., and for the defendant." The lobsters sent to plaintiff by them were transshipped in London *in his name* for sale on account of the packers. In due course he would receive the account sales and furnish the packers with copies of same. Plaintiff went on receiving and shipping in this way with Mitchell and Foote until the dissolution of that firm, and subsequently with defendant. He charged $2\frac{1}{2}$ per cent. on the sales, for transshipping, effecting insurance, correspondence in London with regard to sales, for advances for freight, insurance, &c., &c., &c. As soon as plaintiff would receive account sales he always accounted to the packers, and in rendering the account charged five per cent., which included $2\frac{1}{2}$ per cent. paid for selling in London. After the dissolution of the firm of Mitchell and Foote he conducted the business and continued it in the same manner with defendant without any new arrangement or charge.

It appeared he was not not made aware of the position now taken by defendant in charging him as a *del credere* agent until December 13th, 1883, except from what he could gather from correspondence referred to in the first commission. He further swears that defendant was aware of the parties to whom plaintiff consigned the goods, and that he furnished him with all information and account sales as received by him, and for a year or two prior to making the last shipment in question, plaintiff had been forwarding defendant's lobsters to Carvell and Sons, and had previously forwarded consignments to the firm of Franklin & Co., of London. Plaintiff lastly testifies that nothing ever took place between Mitchell and himself, or

between him and Foote, as to becoming responsible for sales. Nothing of the kind was ever mentioned, and he never agreed in any way to assume any responsibility, except to forward the goods and find a market for them for defendant; and states that Carvell & Sons at the time in question were regarded as most reliable and of the highest commercial standing; of that fact no question is raised, as the evidence of other witnesses under the commission fully sustains it. Comment on this testimony is at present uncalled for. I consider it desirable that an abstract of this evidence should be given in order that we may clearly ascertain from the record, without speculation, what, according to the plaintiff's sworn statement, he contended for and relied on as the established conditions and circumstances surrounding his position and the understood and recognized ground on which he considered he stood towards the defendant throughout the course of their dealings

Turning then to some of the documentary evidence we find a letter marked "Exhibit O," written in July, 1882, by defendant, in which he states, "I am sending to *your care* a consignment of 150 cases of lobsters, high cans, that you will do the best with," and, after referring to some labels ordered by him, he concludes, "I hope you will do the best to suit me in those labels by the return of the steamer. As soon as I receive them I will send you 300 cases more." And by "Exhibit A 1," of date 27th July, 1882, plaintiff says, "Your letter of 10th May, ordering labels, &c., we received by Shattuck yesterday, 150 cans, tall cans, and two cases flat cans lobsters, which we will forward to our agents in London for sale on your account." And "Exhibit B," 12th August, 1882, from same to defendant, "By Shattuck we received 100 cases lobsters for your account, which will be shipped to London first opportunity"; and by "Exhibit E," 21st October, 1882, plaintiff states, "We have just heard of arrival in London of *your* first shipment of lobsters, but when our correspondent wrote they had not yet sold"; and on April 18, 1882, defendant writes: "I have not received account sales of last shipment of lobsters as expected"; in "Exhibit N," 10th May, 1882, he states: "Received your letters of 22nd July and 22nd April, also account sales of first shipment of lobsters; will send you 800 cases in the coming summer, *i. e.*, if the last shipment turn out satisfactorily."

The account sales so furnished on 31st December, 1881, 14th April, 1882, February, 1882, Exhibits B 3 and B 2, are from the plaintiff to the defendant, and show that the sales were

made by the former on account of the latter, whilst it would appear from the account sales from London consignees to Corbett that the sales had been made by them on his account. This is referred to in the latter's evidence, and it so appears that in his account sales the full commission of five per cent. would be charged, covering the two and a half per cent. charged by the consignees in London.

The plaintiff, in "Exhibit F," under date the 21st February, 1883, writes defendant: "We regret to have to inform you that the firm to whom we forwarded your two shipments of lobsters in Aug and Sept. last has failed, &c. You will, of course, understand in this transaction we have been merely acting as forwarding agents, and in no way liable for any loss that may be sustained, &c. If the goods had been our own we would have had no hesitation in sending them to Carvell's house. They were considered perfectly reliable up to the day of the failure," &c., &c. Defendant replies to this on 26th May, 1883, as by "Exhibit P": "Concerning the affair you made of it with the lobsters I sent you last season I shall expect account sales as soon as possible. If not satisfactory I shall be obliged to go to Halifax and have matters arranged myself. I conclude there is a balance of about \$2,000 due me from you," &c. Subsequently plaintiff appears to have furnished defendant with an account shewing the balance of \$966 due, and a demand for payment having been made, the defendant, by letter of December 13th, 1883, writes plaintiff: "Enclosed find order on James Frazer for the sum of one hundred dollars towards payment of account. I heard, by the bye, before I received any notification from you, that you intended seizing the lobsters I sent to Halifax, which I consider you have no right to do. I sent you the lobsters as payment for the goods I had from you. Why then, do you expect me to pay for goods had from you amounting to \$961 when you owe me for goods amounting to over \$2,200? I intend to pay you for the goods I had from you, and I expect you to pay for the goods you had from me; awaiting your reply," &c.

And in answer to a demand made on the 27th June, 1884, by Green & Bunting (the attorneys of the plaintiff) for the payment of the balance due by defendant, he answers under date the 7th July, 1884: "I received yours of the 27th ulto, and note contents. I will be at Halifax the coming fall, and will pay T. D. Corbett & Co. the desired amount then; hoping that will be satisfactory," etc. Such then is the evidence, or

the substance of it, from which it is urged ample or sufficient solid material can be collected to form the legal grounds on which the claim of the defendants can be sustained. I must confess I have been from the first unable, from the facts so developed on the record, to hold any other opinion than the one on the subject. Regarding as indisputable the distinct and simple principles and rules of law, declaring what are the absolutely requisite ingredients necessary to create such a position, I cannot recognize their existence in the present case. On the contrary, I am obliged to yield, not only to the positive and distinct denial of the plaintiff that any such agreement was entered into at all between them, but also to regard the character of the negative evidence of defendant's son—that plaintiff said nothing up to Carvell's insolvency of not being responsible—as strongly confirmative of plaintiff's evidence.

One must be convinced from the evidence so given, and the contents of the exhibits, although some of these may be equivocal and open to different constructions, that the defendant himself was well aware after his eight or nine years of dealings in this special line with the defendant, that the latter was acting during that time as forwarding agent, and that he left to plaintiff the selection of the best market and most reliable consignees for the sale of his goods; that he was well aware of their having been transhipped to London to be realized by the same consignees to whom his agent had, for over a year and a half, consigned previous shipments; that from the account sales from time to time, stated to have been furnished him, he must have known the charges incurred in the realization of the goods abroad; and that plaintiff, as sworn by him, charged on this side a commission of two and one-half per cent. to cover the items mentioned in his evidence—that is, for his trouble in making advances for payment of freights, premiums of insurance, correspondence, looking after transhipment, etc. There was apparently mutual satisfaction and confidence resulting from the connection down to Carvell's bankruptcy, and no question was raised as to the previous commercial standing of that firm, or the propriety of selecting them as such consignees. Notwithstanding the statement of defendant's son, we cannot believe these goods were merely sent to plaintiff in payment for the goods defendant might receive from him, the course of dealing between the parties and the facts are directly opposed to any such position. Nor can it be implied that the goods were sent to Halifax to be there disposed of, consequently the

defendant must have been aware of the course or means adopted by plaintiff in the disposition of his shipments of lobsters.

Turning to defendant's letter of December, 1883, we find that whilst he pays the plaintiff \$100 on account of his indebtedness to him, he asserts these lobsters were sent to plaintiff in payment for goods he had from him; and finally, in his letter to Greene & Bunting, he promises to pay the amount demanded without any qualification or reservation of any kind; and this last communication would be over a year and a half after the alleged cause of action set out in his counter claim arose.

In leaving the matter to the jury, the directions of the judge not only specially referred to the principles already cited, but repeated the equally well-known rules as laid down in *Story, acy.*, and also in *Addin, p. 700*: "That every broker and commission agent who is employed to sell on account of his principal, impliedly promises to execute the commission intrusted to him in a careful, skilful, and diligent manner, and to obey the orders and directions he receives, he is bound to exercise his judgment and discretion to the best advantage for the benefit of his principal." They were directed to ascertain from the evidence whether there was any such special relationship, as contended for by the defendant, created between the parties. The whole of the circumstances surrounding the position of the parties and the evidence as taken under the commissions and that given at the trial, the claim of the plaintiff and the counter claim of the defendant, under the pleadings, were all fully submitted to their intelligent consideration.

The verdict rendered was, it appears to me, neither perverse or unreasonable, and was fully warranted under the evidence, for, in my opinion, that evidence signally failed to establish any such agreement as the law requires in order to create the relations and extraordinary responsibilities arising out of the position of one acting under or for a *del credere* commission. It is scarcely necessary to repeat that there was no proof of an "absolute agreement" nor any of a "guarantee" or "warranty," nor in the absence of these was there proof of any "*usage of trade*" by force of which the plaintiff could be made answerable to the defendant.

I therefore consider this rule, for a new trial, should be discharged with costs.

HON. SIR F. B. T. CARTER, C. J. :

Upon the application in this case for a new trial it is unnecessary for me to repeat the facts as they fully appear in the judgment of Mr. Justice Little, before whom the trial was had with an intelligent special jury. I have carefully read over and extracted the evidence given at Halifax, Nova Scotia, under the two commissions, also the *viva voce* evidence given at the trial, and examined into the cases cited in the argument, together with the law generally applicable to a matter of this character.

The question for the jury arose chiefly under a counter-claim, setting up what is termed a *del credere* commission or guarantee, by which the defendant contended that the plaintiff was personally liable to him for the price of a certain article of merchandize, canned lobsters, forwarded to him for sale, and for the proceeds of which he had not been paid or credited as he ought to have been. The plaintiff admitted the receipt of the lobsters, but considered himself relieved from further accountability on the ground that the agents abroad, to whom they had been consigned for sale, had become insolvent, and that he had not received any proceeds, of all which he had duly informed the defendant.

If the plaintiff had received the articles under a guarantee as before mentioned, he would, of course, be responsible for the agents or vendees; but I am unable to discover any evidence that there ever was, at the commencement of, or throughout the long course of dealings between the parties, any express or implied arrangement by which the plaintiff undertook to become personally responsible in the event of the failure of others concerned in the sale or purchase of the articles, nor can I perceive that there was any sufficient evidence or usage of trade, whether from the amount of commission or otherwise, by which it could be fairly inferred the plaintiff had made himself thus responsible. The assertion that the lobsters were sent to the plaintiff in payment for goods received from him, is certainly not borne out by the evidence. He was never a purchaser, nor were they ever disposed of in the Halifax market. It was known throughout that the plaintiff acted as a forwarding agent in shipping to London and in sending account sales to the defendant, after their disposal there by the agents to whom entrusted; occasionally the defendant had asked to be furnished with those account sales. The change in this agency does not

appear to have been made without consideration, and Carvell and Co., by whose failure the loss occurred, had at the time the reputation of stability in business and credit, as was testified to by the managers of banks with whom they had dealings and to whom their commercial standing was known.

It is also said the defendant was not aware of the change in the agency; whether he was or not I do not consider that would of itself have affected the relative positions of the parties if the plaintiff had made the selection with due caution and prudence, not having received any special directions from the defendant as to the employment of an agent; but it would appear from the evidence of the plaintiff that Carvell & Co's name was in account sales rendered the defendant after the change, and yet not a letter nor an account sales, or a single paper of any kind, that had passed between the parties was produced at the trial by the defendant in refutation of any statement made by the plaintiff, which, it is not unreasonable to infer, would have been the case if favorable to the defendant's contention. The defendant was not examined.

Besides all this, and when all the circumstances were known, there is the unconditional promise of the defendant in his letter of the 7th July, 1884, in answer to the demand of the plaintiff's solicitors, Messrs. Greene & Bunting, in these words: "I will be at Halifax the coming fall, and will pay J. D. Corbett & Co. the desired amount then; hoping that will be satisfactory."

After a careful review of all the circumstances, I am unable to say the verdict of the jury "was contrary to the weight of evidence, that it was one which reasonable men ought not to have given, but that it was so unreasonable that a jury could not properly give it if they really performed the judicial duty cast upon them"; *Metropolitan Railway Company vs. Wright*, 11 Ap. cas. 152.

The plaintiff resides in Nova Scotia and the defendant in this country, and, no doubt, generally well known, so there is no reason in supposing there was any undue partiality by the competent jury who tried the case towards the plaintiff. The verdict was not perverse, and I should regard it as an arbitrary exercise of judicial authority to interfere with the province of the jury by disturbing their finding and prolonging litigation between the parties.

HON. MR. JUSTICE PINSENT :

The plaintiff seeks in this action to recover from the defendant a balance of account of over \$900, said to be due upon transactions covering some years.

These dealings arose chiefly upon shipments of canned lobsters, of which the defendant is a packer, and the proceeds of which went into general account between the plaintiff and the defendant.

The defendant pleads that the plaintiff has failed to account to him for the last shipment or two he made to him, and that there is consequently a large balance in his favor, which he makes the subject of counter-claim.

The plaintiffs, Corbett & Co., (residents of Halifax, N. S.,) say they were defendant's "forwarding agents" only, and that they made the best disposition they could of his lobsters by consigning to a house in London (Carvell & Co.) of good standing and unsuspected credit; that, although this firm failed before the shipments were accounted for, there was no fault on the part of the plaintiffs, and that they are not bound to answer for the consequences.

The defendant's case, in answer to this, is that the plaintiffs had shipped the lobsters to their own agents and not to his, and to a firm which was for the first time and without his knowledge employed as commission agents in London for the sale of his lobsters; that the proceeds entered into account between the plaintiff and Carvell & Co., and not between that firm and the defendant; and that the commission charged by plaintiffs to defendant is a *del credere* one of five per cent., and found on inquiry to be shared equally by the London firm and the plaintiffs, although appearing in plaintiffs' accounts with defendant as a single charge by the plaintiffs against the defendant of five per cent.

It appears to me that at no time throughout the transactions of several years between the parties to this action were the plaintiffs "forwarding agents" simply. The London houses were the agents and consignees of the plaintiffs, not the agents or consignees of the defendant, to whom the plaintiffs were simply to discharge the duty of "forwarding" the goods.—There seems to have been no privity whatever between the defendant and the London houses. The accounts of sales were kept between them and the plaintiffs; the consignees are described in plaintiffs' letters as "our London agents." "The ac-

count sales," says one of the plaintiffs in his evidence, "show goods sold by us on account of defendant, and all shipments were made in our name." Speaking at one time of the state of accounts between plaintiffs and defendant, the plaintiff (Corbett) observing in a letter that there is a balance in their favor writes, "against which *there will be proceeds* of the last two shipments of lobsters."

One of the accounts of sales before me, put in by the plaintiffs, dated in February, 1881, is headed thus: *Account sales of 141 cases lobsters, ex "Caledonia" from Halifax, sold by R. Franklyn, for account of F. D. Corbett & Co. ; and against the proceeds of these lobsters there is, amongst other charges, five per cent. commission.*

It here expressly appears that the London sale was on account of the plaintiffs, Corbett & Co.

Much of the testimony given by the plaintiff (Corbett) is unsustained by the documentary evidence he himself puts in. His description of his agreement with the defendant appears to me to be simply the construction which he would now put upon the transactions, and his expressed belief that the letters and accounts would shew that the defendant was aware of the change of London agency, is at variance with the facts. The correspondence attached to the evidence shews that the change from Franklyn to Carvell as London agents was never disclosed to the defendant until after the bankruptcy of Carvell, into the assets of whose bankrupt estate the defendant's lobsters or their proceeds seem to have gone and to have passed into account between Corbett and Carvell ; and it appears that no account sales of the shipments to Carvell ever reached the defendant's hands.

Moreover, it is in evidence that the percentage charged is, in amount, one which should amply cover "commission and guarantee," and instances are in proof in which two and a half per cent. covers "commission and guarantee"; it is shewn that there are shippers in St. John's consigning to agents in England who do a similar business at that rate at their own risk, and account to the packer for the proceeds.

It has been suggested that the present defence to this action is an afterthought of the defendant ; but, as a matter of fact, no occasion had ever before arisen in the course of the dealings of the parties to this action, in which the question of the defendant's rights or the plaintiff's responsibilities became a question, and the inquiry then for the first time arose, what were, under the circumstances, the rights and obligations of the

parties, in determining which any tardiness on the part of the defendant, arising from ignorance or uncertainty as to the precise form of asserting his rights, and that, too, in the absence of the information which he had a right to expect from the plaintiff, is not now to be used to his disadvantage.

The jury in this case found a verdict for the defendant, disallowing his counter-claim.

The defendant obtained a rule *nisi* for a new trial upon the ground that the verdict was contrary to evidence, and for non-direction and mis-direction.

I am clearly of opinion that there should be a new trial.

Even assuming that there was sufficient evidence to justify a jury in finding that, prior to the shipments to Carvell & Co., the former consignee, and when the shipments were being made to Franklyn, the defendant had acquiesced in a course of business, of which he was to take the risk, contrary to all presumptions in his favor, and notwithstanding the positive testimony of his son (his agent), I am most strongly of opinion that the jury, with regard to these last shipments to Carvell & Co., should (if they were not) have been directed to take into consideration the altered relations of the parties through the appointment of new, and, to the defendant, unknown agents and consignees, and to pay regard to the manner in which accounts were kept and commission charged as between the plaintiff and Carvell & Co.

Whether the jury was sufficiently directed upon this head or not, it is plain to me that they failed to distinguish, as they should have done, between the latter and former relations of the parties; in fact, that they have found a verdict upon the whole case which ought not to be sustained, and that if the rule be not made absolute for a new trial a grave injustice will have been done which it is in our power to correct.

Mr. Greene for plaintiff.

Mr. Morison for defendant.

1888, *March*. SIR F. B. T. CARTER (*For the Court*).*Practice—Contract—Declaration—Demurrer, Illegal Consideration—
Suppression of Prosecution.*

An employee of the plaintiff bank had been arrested and charged with making false entries in the books of the bank, and was about to be prosecuted for the same. The defendants agreed with the plaintiff, that in consideration of the release of the said employee, they would pay to the said bank amount due by said employee not exceeding a certain sum mentioned. The plaintiff released the employee. The defendants refused to pay the sum agreed on. In an action on the agreement, the defendants demurred that the consideration set out was for the doing of an illegal act, and that the agreement was therefore void.

Held—That all agreements for the purpose of “stifling prosecutions” are void, whether the offence be a felony or misdemeanor, except in the case where the party has the option of prosecuting in a civil action, or by public prosecution. When the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution.

IN this action the plaintiff declared that before the making of the agreement hereinafter mentioned, the plaintiff company had accused and charged one Prescott Bulley with having committed a certain offence—that is to say, that he (the said Bulley) being employed as a clerk of the plaintiff, did, whilst he was such clerk, unlawfully, wilfully, and with intent to defraud, make certain false entries in certain books which then belonged to the said plaintiff, the said Bulley well knowing at the time he made such entries that they were false,—and the said Bulley was afterwards arrested and imprisoned in the gaol at Burin, in the southern district of this island, on the warrant of one of the stipendiary justices thereof; and the plaintiff was about to prosecute the said Bulley for the offence; and afterwards and before the making of the said agreement it was agreed by and between the plaintiff and the defendants that, if the plaintiff would consent to the release of the said Bulley from the said imprisonment, the defendants undertook to pay to the plaintiff whatsoever amount (not exceeding one thousand pounds currency) was then due by the said Bulley to the bank, such payment to be made within ten days after demand; that plaintiff did consent to the release of the said Bulley from the said imprisonment, and he was by and with such consent released, whereby the plaintiff became entitled, etc., etc., with six per cent. interest.

The defendants demurred on the grounds that the consideration set out in the said declaration is for the doing of an illegal

act, the promise being by the plaintiff to refrain from prosecuting for an illegal act, and to obtain the discharge from gaol of a person charged with the committal of a crime, on which there was joinder.

There is no principle of our law more firmly established than that which renders contracts or agreements for the purpose of "stifling a prosecution" void, as tending to obstruct the course of public justice, and it matters not whether the offence on which the agreement is founded constitutes a felony or a public misdemeanor; it is obviously to the interest of the public that "the suppression of a prosecution should not be made matter of private bargain," and was so held in *Chubb vs. Hutson*, 18 C. B., N. S., 414, 417, that a promissory note given in consideration of the payee's forbearing to prosecute against the maker a charge of obtaining money under false pretences, was illegal and could not be enforced. The only recognized modification of the rule is when the party has the option of prosecuting in a civil action or by public prosecution, such as for an assault to the person, as there substantially the only one who suffers by the wrong is the individual against whom it is committed, and "the law," says the court of Queen's Bench, in *Keir vs. Leeman*, 6 Q. B., 321, the principal case on this subject, "will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it, such as where there has been personal violence accompanied with riot and the obstruction of a public officer in the execution of his duty; these are matters of public concern, and therefore not legally the subject of a compromise.—*Smith's contracts*, 234; and so rigidly is this principle observed that, to repeat the words of the Court of Queen's Bench in speaking of that in *Collins vs. Blautern*, 2 Wills, 341, "no doubt can be entertained whether the party accused were innocent or guilty of the crime charged. If innocent the law was abused for the purpose of extortion,—*Goodall vs. Lowndes*, 6 Q. B., 464. *Davies vs. London and Provincial Marine Ins. Co.*, 8 Ch., Div. 469; "if guilty, the law was eluded by corrupt compromise, screening the criminal for a bribe,"—*Keir vs. Leeman*, *Supra*.

It was not considered necessary in this case to set up the

defence by plea, as in *Collins vs. Blautern*, as the plaintiff's statement of the cause of action sufficiently furnishes the facts to raise the legal question by demurrer. It is distinctly averred in that statement the plaintiff had accused and charged Bulley with having committed a certain offence when employed as a clerk of the plaintiff, and the offence described is that he did, whilst such clerk, "unlawfully, wilfully, and with intent to defraud, make certain false entries in certain books, which then belonged to the said plaintiff, the said Bulley, well knowing at the time he made such entries they were false,"—further, that for this offence, Bulley was imprisoned in a gaol under magistrate's warrant, for which the plaintiff was about to *prosecute him*, when it was agreed between the parties that if the plaintiff would consent to the release of Bulley, the defendants undertook to pay to the plaintiff whatever amount, not exceeding one thousand pounds, was then due by Bulley to the Bank, that such consent was given *whereby* (that is in consequence of the release of Bulley, from imprisonment, at the time for the afore-said offence), the plaintiff became entitled, &c., &c., &c.

Mr. Kent, for the plaintiff, contended in argument, the agreement did not contravene any principle of the law, that the falsification of the Bank accounts or books, was made a misdemeanor, and not a felony, by the Imperial Act 38 and 39 Vict., cap. 24, which extended to this colony; that it was a matter entirely between the Bank and the clerk, and not a public offence, and did not admit of a proceeding of a public nature. In this respect there is no distinction, as is evident from the authorities, between a felony and a misdemeanor of a public nature,—a compromise in either is declared to be illegal in the case cited of *Kier vs. Leeman* and other cases, one of which, in confirmation of the principle therein decided, and before referred to, that of *Collins vs. Blautern*, is regarded as a leading case to show that illegality may well be pleaded as a defence to an action on a bond, which was alleged to have been given to the obligee, as an indemnity for a note entered into by him, for the purposes of inducing the prosecutor of an indictment for perjury, (a public misdemeanor), to withhold his evidence; for the plaintiff it was contended that the bond was good and lawful, the condition being simply for the payment of a sum of money, and that no averment should be admitted, that the bond was given upon an unlawful consideration not appearing on the face of it; but it was held that the bond was void *ab initio*, and that

the facts might be specially pleaded; and it was observed by *Wilmot, C. J.*, delivering the judgment of the court that, "the manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and shew the transactions in their true light"; also, *Cannon and others vs. Rands*, 23 L. T., 817, where the treasurer of a friendly society had embezzled the funds and the trustees agreed to take a bond from sureties with a sum of money, to forego a criminal prosecution against him, the bond was declared an illegal agreement to stifle a prosecution—the illegality was shown by the pleas of the defendant, as in the last cited case, to which there was a demurrer and joinder.

So, in the present case, if the agreement had been for the payment of a sum of money simply, it would have been competent for the defendants to have pleaded the facts in a similar manner, but that is rendered unnecessary by the plaintiff's explicit statement of the offence imputed to the clerk, which clearly shews it to be a public one of a criminal nature, and I may add, admittedly within the terms of the statute quoted, entitled "An Act to amend the law with reference to the falsification of accounts" Mr. Kent urged further, there was no promise shown to refrain from a criminal prosecution. I think it would be irrational, on reading the allegations in the declaration, to arrive at any other conclusion as the condition for the undertaking to pay one thousand pounds for the release of the imprisoned offender; whereby, that having been done with plaintiff's consent the plaintiff bank became entitled to the money. But the agreement to abstain from prosecuting may be either express or necessarily implied,—*Ward vs. Lloyd*, 6 M. & G. 85,—as it certainly may in this case. This action does not come within the class of cases such as *Flower vs. Sadler*, 10, Q. B., 572, where a just and bona fide debt actually exists, even though a criminal liability might possibly be involved, a threat to prosecute would not, it seems, necessarily vitiate a subsequent agreement by the debtor to give security for the debt he justly owes. And in *Hayward vs. Whitaker*, reported in the 3rd vol. of the *Times Law Reports*, 537, decided March, 1887, "when the relation of debtor and creditor exists the acceptance of a security by the creditor from a third person is not rendered illegal by the mere fact that the creditor is thereby induced to abstain from prosecuting, although the debtor may have been

given in custody by the creditor with a view of being criminally prosecuted." In that case a married woman gave the security for the release of her husband from custody on a charge of the defendant, but the report says there was really no case against him, of which she was made aware, and as a free agent gave the security for the husband's liability.

The decisions are numerous on the compounding of public offences; but the same principle of law pervades all of them in declaring as invalid all contracts or agreements having that tendency as being in contravention of the policy of the law. Another leading case is that of *Williams vs Bayly, L. R., 1 Ap., Cas. 200*, which was decided on appeal before the House of Lords; there a son had committed forgeries on a bank in the name of his father; the bankers insisted on a settlement, (though without any direct threat of a prosecution), to which the father was to be a party; he consented and executed an equitable mortgage of his property. The notes with the forged indorsements were then delivered up to him. Held that the agreement was invalid. The language of Lord Westbury in delivering judgment is very emphatic and to the point, he said, "I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. *If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.*" These remarks apply equally to a misdemeanor or to any other offence of a public nature, not the subject of both a civil action and criminal prosecution.

If we had all the circumstances of this case disclosed before us on a trial, as were in that, I might probably say, with Lord Westbury, the plaintiff, perhaps, fairly thought the best was being done for family interests, and, I might add, for the bank; he did not mean, any more than I do, to convey any reproach, and dealing only with abstract principles of law which prescribe the duties of individuals under such circumstances, and in vindication of the policy and justice of the rule.

I ought not to omit the appropriate observations of that eminent jurist, Lord Mansfield, in *Holman vs. Johnson, Coup. 341*, "the objection that a contract is illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of

policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff by accident, if I may say so. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

We are all of opinion the demurrer has been sustained, and we give judgment for the defendants.

Mr. Kent, Q. C., for plaintiff.

Mr. Greene and *Mr. E. P. Morris* for defendants.

MORRIS v. MURPHY.

1888, *May*. HON. SIR F. B. T. CARTER, C. J.

Donatio mortis causa—Bank notes—Resumption of possession.

The deceased requested her son, with whom she resided, to draw from the Savings' Bank, for her, \$1,200, which he accordingly did, and having brought it home, she placed it in her box. This was some six months previous to her death, and some short time after the execution of her last will, in which her properties and her monies had been bequeathed in detail to her children. It was stated by the son that this sum was afterwards in the presence of witnesses allocated by his mother to various parties (including himself for the largest amount), conditional in the event of her not living. Some weeks before her death deceased gave her son the key of the box, and requested him to take out the said sum, which he did, and count it; she then directed him to replace it in her box, confirming her previous directions with some additions. After her death the son distributed the amount as directed. In an action by the executor for the \$1,200,—

Held—That the facts as deposed to did not constitute a *donatio mortis causa*.

THIS action is brought to recover the sum of twelve hundred dollars for money received by the defendant for the use of the plaintiff executor, and for the conversion by the defendant to his own use of three hundred bank notes, the property of the plaintiff, of the value of twelve hundred dollars. The defendant pleaded never indebted, not guilty, and that the bank notes were not the property of the plaintiff as alleged, upon which issue was joined.

With consent of the parties the case was heard before me, and several witnesses were examined. It is a family contention and the circumstances deposed to are: that Mrs. Murphy,

the testatrix, was possessed of considerable property near to and in the town of St. John's, also money deposited in the Savings' Bank, all of which she disposed of by her last will, prepared in August, 1886, by the plaintiff, a practising barrister and solicitor, whom she appointed executor, and to whom probate was granted. Besides a bequest for religious purposes, and the erection of a tombstone, she bequeathed certain lands, dwelling-houses and premises to each of her sons, William Henry and Patrick, and, with other property, gave the more valuable farm property, where she had resided, with stock, cows, horses and everything on the premises to her son, Michael, the defendant, who appeared had all along lived with her; she also gave to his son, her grandson, James, property in remainder, and to her two step-sons, Peter and James Murphy, twenty pounds each, and "devised that out of whatever monies her executor should have belonging to her after the payment of all her just debts, legacies and funeral expenses, he should divide equally amongst her children, Margaret, wife of William Tobin, William, Henry, Patrick John, Catherine, wife of John Ryan, and Anastatia, wife of James Aylward." There was no contention about the contents or execution of the will, the only question is as regards a sum of twelve hundred dollars, the subject of this action, which was drawn by Michael out of the Savings' Bank deposit sometime after the making of the will, and which first came to the knowledge of the plaintiff after the death and interment of the testatrix which events occurred in May, 1887. When the plaintiff received this information from the defendant, he was particular in reducing to writing at the time the circumstances in connection, as stated by him, which in a most material point is at variance with his (defendant's) evidence before the court, as will be seen hereafter. Michael's version is that about the 1st October, 1886, at the request of his mother, who gave him her Savings' Bank book, he drew \$1,200, and took it home to her. About two or three months before her death, his brother, Henry, and sister, Catherine Ryan, were sitting in his mother's bedroom; they called him in, that his mother wanted him; she wasn't in a very low state then; told him that out of the money in her box she was going to give Henry £100 after her death, and if she wouldn't die at that time she wouldn't give any to him, as she might want it herself; also, at the same time, she said he was to give Mrs. Ryan, then in the room, Mrs. Tobin and Mrs. Aylward, all sisters, £20 each; she said she didn't promise this money to any

one if she lived. About a fortnight after this she, in the presence of Mrs. Aylward, told him he was to give her £20 after her (mother's) death. After this he had no communication with his mother respecting this £300. Sometime, it might be two months before her death, he was in the room with her alone, when she told him to give the wives of his brothers, Patrick, John and William, £3 each after her death; that, about six weeks before her death, she gave him all this £300—it was in her box in a smaller box, the keys of both she gave him; he took out the money and counted it at her request; she told him to take that money, put it in her own box, and to do with it as she had told him,—to give the shares as she told him, to give the little girl a good decent suit of clothes, to bury her decent, and to keep the rest for himself. She died 25th May, 1887, in her own house; he lived with her all his life and was married; she left him that house; he didn't think anyone saw him put the money in his mother's box, but his wife saw him take it out. After the funeral, he paid his brother, Henry, £100, and £20 to each of his three sisters aforesaid, and £3 to each of his brothers' wives as directed. After that having heard from his sister, Mrs. Ryan, her mother had told her that William's wife was to have £5 and the others £4 each, he paid them the difference; he also paid the funeral expenses as by accounts produced, £27 17s. 1d.

On cross-examination he says, his father died about six years last fall (1887). Patrick and John got shares of his property; William didn't; he, defendant, was sick about a week after mother made her will. She told him when he got strong he was to go to town for money, as she had none. There were two bank books of £400 and £200; he drew all of the latter and £100 from the former. She was in bed complaining when he got the books. After that she told him she wanted Mrs. Tobin. She didn't come. She told him to send for Henry who came, and in his presence and that of Mrs. Ryan, she gave the directions about the distribution of the money as before stated. She gave him the £300 in her last illness, telling him what to do with it; he had the money in his possession at her death; he had for himself out of this about £90. About a week before her death, she told him to give the bank book in her box to her executor after her death, which he did. He told the plaintiff executor, after her death, about her directions. Can't say, but thinks he took it down in writing. Plaintiff read it over; what he read to him was correct. Mr. Morison reads from this writ-

ing; he can't say if it was read over to him. It is, he says, correct about his paying Henry and the others these monies he was told about before Patrick's day (1887), and before he took the money out until then he didn't know where she kept it. When he brought it, put it in the small box, in twenty dollar notes, and gave the keys of both boxes to his mother, which she kept. When he got the money from her, with the directions as before stated, it was about the end of March. She told him to give the amounts as directed after her death, but to keep the money as she might want it. At this time she was in no danger of immediate death as he could see. She was bad twelve months. He didn't know she was dying until it came to the last; he put the money in a trunk in his room. When she sent him for the money, there were the same means for the support of the house. She had given him the cows a month before; he didn't tell the plaintiff about his having the money, until he had paid those amounts.

The plaintiff in examination stated it was the defendant who came to him in August, 1886, to prepare his mother's will, which he did at her house; at her own request he became the executor; heard nothing of her death until the night before her funeral, at which he attended. Two or three days after, the defendant called at his office; not sure if he had sent for him; he read the will, and asked for any bank books or deposit receipts that were in the house of the deceased. He handed plaintiff a Savings' bank book for £300, who asked him if that book represented all the money; the answer to which plaintiff took down in writing, and is substantially as before stated as regards the directions of his mother, and disbursements of the amounts to his brothers, sisters and sisters-in-law, but essentially different in a most material point in that the plaintiff swears he, the defendant, positively stated to him the money remained in his mother's possession to the time of her death, and the first time he ever heard of the defendant having received the money from his mother, was in examination in court to-day, (the day of hearing, 9th February, 1888); what plaintiff had taken down in writing he read to the defendant at the time, and a fortnight afterwards again sent for him, and read over the statement to him again, which he said was correct. Plaintiff told him he made a mistake in paying the amounts; he had better get them back, and to retain a lawyer. He, plaintiff, had many conversations with defendant, and he never mentioned having received the possession of the money from his mother. After a formal

demand, Mr. Parsons for defendant replied, "his client was prepared to defend any action that might be taken. Mrs. Murphy was strong in mind when she made her will, but helpless. His reason for taking the statement from defendant was to embody it in a petition to the Supreme Court for directions in this matter. It was on his second visit he took the statement, and read it over to him three times.

Mary Murphy, the wife of defendant, states she was present when the deceased gave her husband the bank books to get the £300; that she had told him to put it in the box, but gave no directions. Afterwards heard her tell him to put the money in his box, and to do as she had told him what to do with it, but didn't hear her say what that was; this was about six weeks before her death. She was in bed, he at bedside, and she appeared to be counting the money. Witness saw him take it and put it in his own box, and lock it; the money had not been broken nor required for household expenses; she was helpless, but not in danger of dying, till shortly before her death; her mind was strong.

Henry Murphy confirms the defendant as to the donations to be made in the presence of Catherine Ryan, but with this important difference that Michael was also to have £100 for himself. This was three or four months before her death; her mind was strong. About a month after she told him the same; she made the remark the monies were to be paid if she died, but if she lived she might want the money; he demanded the £100 and got it. In cross-examination, says, Michael gave him the money; he had not to ask for it.

Catherine Ryan gave in part confirmatory evidence of the amounts to be paid after her mother's death, and to whom, but does not mention Michael's name as a donee for any amount. Mother didn't mention any particular fund,—she said nothing about Savings' Bank books; said if she lived she would want the money herself. Michael didn't tell her he had the money. At first she said it was two, after, that it was three or four months before her death. Mother said she and her sisters were to get £20 each, and Henry £100; thinks this said before Christmas, (1886); was paid the £20 the day after the funeral. She knew there was a will, but not the contents; mother said if she lived she would want the money herself.

Anastatia Aylward, daughter, got £20 from the defendant the day after the funeral; heard mother say to him to pay her and her sisters £20 each for *mourning*; to pay Henry £100;

she didn't say from what fund, nor did witness know where the money was to come from. She was sick and helpless often through the winter of 1887. Spoke of her directions as before, up to three weeks before her death was the last time. Defendant was in the room once when she gave the directions. All were provided for by father's will. She told me William's wife was to have £5; John and Pat's wife £4 each. She didn't know of the £300 in the house when paid the £20. Knew there was money; mother told her so.

Margaret Tobin, a daughter, knows nothing of any money mother gave defendant. He paid the £20 the day after the funeral. Mother told her she was to get a present after her death; didn't say of what; would not have looked for it if defendant hadn't paid it. She lived second next door to mother; in and out of her house every day during her illness; at times very sick and helpless, and would get round about till May; up every day till within a day or two of her death, sitting in her chair; was strong in mind; had no conversation about monies. The defendant recalled—positively swears mother gave him the money about two months before her death, and took possession of it; put it in his box and kept the key till she died. *He would have done with the money whatever she said respecting it. It was her money to the time of her death.*

The defendant contends there was a valid gift *donatio mortis causa* to the defendant, coupled with a trust or trusts, or strictly, a trust of the bank notes or money aforesaid, under the evidence substantially detailed alone.

This is a very important action, not only as regards the amount in question to the parties interested, but is especially so with reference to the principles involved in its determination, and, I may add, of rare occurrence in our courts. A *donatio mortis causa* is described to be a gift of personal property by one who apprehends that he is in peril of death; and evidenced by manual delivery by him, or by another in his presence, or some one else for the donee of the property itself, or of the means of obtaining possession of the same; or of the writings by which the ownership thereof was created and conditioned to take effect absolutely in the event of his not recovering from his existing disorder, and not revoking the gift before his death—(substitute she or her where necessary.—*Story, sec's 606, 607; Smith, Equity, 133; Powell vs. Hellican, 26, Beav. 261.* To establish such a donation as was said in *Cosnham vs. Grice, 15 Moore, P. C. C. 215*: "It must be by evidence of the clearest

and most unequivocal character the burthen of proof is necessarily cast on the donee, as in the first place so many opportunities and such strong temptations present themselves to unscrupulous persons to pretend death-bed donations, that there is danger of having an entirely fabricated case set up"; and by the master of the rolls in *Walter vs. Hodge*, 2 Swan's, 100: "All the minutiae of such transactions are to be examined, the effect depends upon every word and minute act." Such a gift differs from a legacy, as it takes effect *sub modo* from delivery in the lifetime of the donor, and therefore cannot be proved as a testamentary act. It requires no assent or other act on the part of the executor or administrator to perfect the title in the donee. As an incident it is revocable during the donor's lifetime, and conditioned to take effect only on the death of the donor by his existing ailment. *Tate vs. Hilbert*, 2 Ves Jur., 120; *Stanisland vs. Willot*, 3 Mac. & G. 675, &c., &c.; and if he live that the thing shall be restored to him,—1 Williams, Exrs. 778,—yet it is equally clear by the decisions that the deceased should, at the time of the delivery, not only part with the possession, but also with the dominion over the subject of the gift, —*Hawkins vs. Blewit*, 2 Esp. N. P. C., 663; *Reddell vs. Dobree*, 10 Sim. 244. Stress was laid by plaintiff's counsel in this present case, that, even if there had been a delivery of the money to the defendant, yet on his own shewing deceased had expressly reserved to herself at the time the unconditional right to dispose of it if she so pleased, which, it was argued, was inconsistent with having parted with the control or dominion; however, it may be said on the other hand, this was doing nothing more than the law would recognize as incidental to such a gift; because per Lord Chancellor Cottenham, in *Edwards vs. Jones*, 1 Myln & Cra. 226, the donor does not part with the whole interest save only in a certain event, that of his death, and it is of the essence of such a gift, it does not otherwise take place. Such a donation leaves the whole title in the donor unless the event occurs which is to divest him."

In the cases I have cited, the absolute dominion was not surrendered, as is contended it was here on behalf of the defendant, by the asserted delivery to and possession by him, and there was no resumption of possession. As regards the establishment of a trust, independently of a gift of this character, the express reservation would invalidate it, as in that it is necessary the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such

interest beyond his own reach. (*Warriner v. Rogers*, 16 L. R., Eq. 340.) There may, it seems, be a valid *donatio mortis causa* coupled with a condition or trust. *Blaunt v. Bunor*, 1 Ves., Junr., 546; *Shenstone v. Buck*, 36 W. R., 118; *Dunn v. Boyd*, 8 I R., Eq. 609), but the expression of the trust or the condition must form part of the donation, either by being contemporaneous with it, or so coupled with it by contemporaneous words of reference, as in effect to be incorporated with it.

The deceased would appear to have been an intelligent person, and aware of the legal necessity of having her last will duly prepared and executed, as apparently was also the defendant, who for his mother, the deceased, requested Mr Morris, the plaintiff, to visit her to receive instructions for the preparation of her will, which he did prepare; and it was executed as by law required. By that document, which we may assume to have been deliberately dictated, the defendant was the chief legatee, and largely benefited, doubtless he was anxious that he should be secured in the interest he was to derive, and not trust that to the mere verbal expressions of his mother's intentions or to accident; at the same time the interests of others, his brothers and sisters, were regarded, and a seemingly thoughtful testamentary disposition of her property made by the deceased among those of her children whom she had selected to be the future recipients of it. She, as will be seen, named those (7) who were to have apportioned among them her monies not disposed of, which included the amount in question. Defendant was *not* one of these residuary legatees.

Assuming that the scattered conversations in fact took place between the deceased, her sons and daughters aforesaid, as regards the alleged donations and appropriation of the twelve hundred dollars, yet up to the point of the alleged delivery there was nothing transacted to transmute the possession or the right thereto from the deceased to constitute a *donatio inter viros, mortis causa*, or a trust, nor anything that was not referable at the most to a testamentary disposition, to effectuate which, the requisites of the statute of wills should have been followed, and with equal formality in execution as regards any change in the bequests, as observed by the will which was made in August, 1886. Our law declares no will shall be valid unless made in writing, nor unless it be either in the handwriting of the testator and signed by him, or if not so written and signed by him, in the presence of at least two witnesses, who shall, in the presence of the testator, sign the same as witnesses, &c. Provided

that any seaman or fisherman, *being at sea*, may dispose of his property in the same manner as before the passing of the statute, that is by what is technically known as a nuncupative testament, where the testator without any writing declares his will before a sufficient number of witnesses. The observations of the Master of the Rolls delivering judgment in *Walter vs. Hodge, Supra.*, may be fittingly inserted here:—"It becomes the court to recollect the principles stated by Lord Hardwick in *Ward v. Turner, 2 Ves., 431*, who laments that the statute of frauds which imposes rigorous restrictions on nuncupative wills, had not abolished gifts of this nature, (*donationes mortis causa*), to consider to what perjury such gifts may afford occasion, and how nearly they amount to an evasion of the statutory precautions against nuncupative wills. It is quite evident that if too much facility is afforded to *donationes mortis causa*, a door is opened to elude the statute." The proof of the essential requisites of delivery and possession to effectuate the alleged gifts, rests altogether in the evidence of the defendant and his wife before given.

It is rather a strange circumstance and one deserving of remark that none of the expectant beneficiaries who were examined had knowledge of this money being in the house, nor from what special fund, if any, the amounts were to be paid; all that would appear to have been carefully concealed by the defendant, even Mrs. Tobin, the eldest daughter, who lived second next door from her late mother's house, and in and out there daily, was not made aware of this money being in the house or of any having been given to the defendant; her mother had intimated that she was to have a present after her death, but did not mention of what; and such provision was made by the residuary clause in the will to which her mother may have had reference. Defendant gave her the £20 the day after the funeral, which was her first knowledge of the gift. We thus discover that she, the defendant's wife, who was constantly about and attending on the deceased, never heard any directions given by her as to the appropriation or distribution of this or any other money or fund either before, at, or after the alleged delivery; and it is very singular if it can be regarded as a mere accidental circumstance that all the conversations or conferences in that respect, asserted to have been had between the deceased and the others were so had during the absence of the defendant's wife, and more especially when the alleged change of possession took place. She never heard any of those specific directions to which the defendant testifies as having

been given at that very time, but only "to do as she, the deceased, had told him," and what that may have been she would appear to have been altogether in ignorance; so that even she fails to corroborate the defendant in a material point, however much that might have availed under the circumstances. All called to testify to the alleged intended donations are interested parties; and independently of the vital question of delivery, there has been no corroboration whatever from any disinterested source throughout. In *Wynne Finch vs. Wynne Finch*, 48 L. T. 129, upon the question of delivery as a gift of articles of value by a deceased husband to his widow, sworn to by her alone, and also relying on the fact of the articles being left in the house of the deceased, the Court of Appeal, 1883, held the claim had failed, "the rule of the courts not to allow against the estate of a deceased any claim which is supported only by the uncorroborated testimony of the claimant, applies not only to alleged gifts, but to alleged debts; the rule is not a rule of law, but of prudence"; so in *Grant vs. Grant*, 34 Beav. 627: "though in many cases it may prevent a person from recovering what he is justly entitled to, still the court cannot act on the mere unsupported testimony of the claimant." In *Tate vs. Hilbert*, *supra*, the Lord Chancellor considered the proceeding perfectly fair and honest, but, though that, he says, is the colour of the facts in the present instance, yet these cases are liable to the observations which have been made, that to make a stretch to affect gifts made to persons surrounded by relations, who give evidence for each other, would be attended with great inconvenience; and in *Walter vs. Hodge*, *supra*, by the master of the rolls, "to prove the facts of donation, the authorities appear not to require a plurality of witnesses, but only that the proof be satisfactory." Now, with all the evidence given in support of the alleged donations and trust, I should have great, if not insurmountable difficulty, if it altogether stood uncontradicted in pronouncing it as satisfactory for the purpose, and giving it the *pro tanto* effect of a codicil in a substantial alteration of the residuary provision in the will to the prejudice of some of the legatees therein named; but all doubt is removed from my mind on considering the testimony of the plaintiff, Mr. Morris, who has no personal interest in the matter beyond the faithful discharge of his fiduciary duty, together with the surrounding circumstances; he has pledged his oath that the defendant positively stated to him that the money remained in his mother's possession until the time of her death;

the first time he had ever heard of the defendant having received the money from his mother was on his examination in court to-day, 9th February, 1888.

Besides, there are material discrepancies in the evidence of the defendant and his witnesses, and matters of suspicion which tend to shake one's confidence in the consistency of their testimony; for instance, the defendant states that the direction of his mother about the donations when Henry and Catherine Ryan were present was about two or three months before the death. Henry says three or four months; Catherine Ryan at first says it was about two months; on cross-examination, she thinks it was before Christmas, 1886; afterwards, it was three or four months. At that same time the defendant, Michael, says nothing of a gift to himself; Henry, that Michael was to have £100 (the same as was to be given to him); Catherine Ryan says nothing of a gift to Michael; and the first time he states he was to have an amount was at the time of the alleged delivery of the bank notes, about six weeks before his mother's death, and then, after paying the gifts mentioned, "he was to have the rest for himself." In the statement he made to the plaintiff, he says: "My mother, before she died, told me that the money which would remain in my hands after paying the above sums and her funeral expenses, I could keep the same, and she repeated the same, or words to that effect, to my brother Henry." In this statement there is not a word about the delivery of the money to him, at which time it was, as he swore in court, his mother told him "he was to have the rest for himself," and Henry all along sticks to the sum of £100, which his brother, the defendant, was to have. The defendant, Michael, further states his mother told him the wives of her three sons named were to have three pounds each; Mrs. Ryan told him one was to have five pounds and the other two four pounds each, and he paid the latter sums on such bare information without at all consulting the executor. In fact there was suspicious haste in the payment of the alleged donations, assuming they were so paid. The receipts from Henry, Catherine, Margaret and Anastatia, son and daughters, are evidently in the same hand-writing, signatures and all, and, I cannot avoid remarking, as having been prepared with a show of artful concoction, as in each "*left by my mother, Mrs. Murphy, on her dying bed, outside the will.*" The daughters who say they received the twenty pounds, knew nothing of the residuary clause in the will at the time, under which it appears each would have

derived a larger sum, whilst Henry, who was by that placed on an equal footing with them, got one hundred pounds, and the defendant, who was not hereby a legatee, a like sum. Henry and his sisters still, as may be inferred from the tenor of their receipts, would claim each an equal share of the balance in the hands of the executor with the others, three of whom, William, Patrick and John, were altogether ignored in the settlement of the donations.

There was ample time within which Mrs. Murphy, if it were really her intention to alter the effect of her will, could have properly done so and not trust to loose expressions of intention where the large sum of twelve hundred dollars was involved. Although the law does not favor donations thus made, yet if she had been taken suddenly ill and not had time to execute a formal document, this matter would present a different aspect from what it now does. I concur in the remarks of an American writer in a recent publication, *The American Law Review*, on the subject of *Donationes Mortis Causa*, who says: "they lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. If large estates amounting to thousands of dollars may be thus disposed of and the title of the donee supported mainly by his own testimony and that of near relations, the public feeling of security may well be startled."

I am gratified that after a careful review of all the circumstances connected with this proceeding, I am enabled, in what I believe to be in furtherance of justice and the true merits, to pronounce a judgment which cannot be cited as a precedent in supporting alleged death-bed donations on such weak grounds having so dangerous a tendency, as was attempted to be established in this case. I give judgment in favor of the plaintiff for the amount claimed (twelve hundred dollars), less the funeral expenses (one hundred and eleven dollars and forty-two cents). In settling with the residuary legatees the plaintiff will, of course, deduct the amount received by each on account of the alleged gifts.

Mr. Scott and Mr. E. P. Morris for plaintiff.

Mr. Morison for some legatees.

Mr. Parsons for defendant.

1888, *May*. HON. MR. JUSTICE PINSENT.

*Master and Servant—Maliciously instigating master to discharge servant—
Right of action—Special damages—Appeal.*

Where a hired shareman was engaged to proceed to Labrador with a dealer and freighter of the defendant, the latter refused to allow his master to take him in the vessel. No reason was assigned for refusal. The plaintiff was prevented from continuing in the service. In an action for damages against the defendant, in supporting the judgment of the magistrate on appeal, the court

Held—That procurement of loss or damage to another by instigating masters to discharge their servants is actionable. That there is no distinction between the principle, of instigating a master to discharge his servant and that of instigating a servant to leave his master. Appeal dismissed.

THIS case comes before me upon appeal from the district judge of Harbor Grace, sitting as a stipendiary magistrate and justice of the peace at Bay Roberts; and the strict mode of proceeding, by way of obtaining the directions of this court as to the law applicable to a case as being tried, would seem to be upon a case stated. The proceeding by *appeal* applies to orders made and judgments of the district court as such, in matters exceeding in amount twenty dollars. As, however, the parties and the judge himself are desirous of obtaining the opinion of this court, and of being governed by it, I do not deem it necessary, of my own motion, to raise a difficulty which would exclude the decision of the real issue.

The plaintiff sets out the claim as being for "Damages sustained through defendant's compelling plaintiff's master to dismiss him from his service." The plaintiff was a hired shareman of one Charles Parsons, a dealer and freighter of the defendant's, and was engaged to proceed with Parsons to the Labrador fishery. The plaintiff "entered into collar" with Parsons, and worked in his service prior to the intended voyage to Labrador.

Parsons and his crew were to proceed to the Labrador in defendant's vessel, and when the plaintiff went to take his passage in the vessel, the defendant refused to allow his master (Parsons) to take him; ordered him not to have anything to do with the plaintiff, and threatened that if he went on board his (plaintiff's) vessel, he would turn him ashore.

No cause is alleged and no reason given for the course of conduct pursued by the defendant, beyond that some cause of offence, of the nature of which the evidence is wholly silent, had existed between the plaintiff and defendant since a former voyage of the plaintiff with him.

To this prevention of the plaintiff from continuing in his master's service, Parsons was no party, although he was ultimately so placed that upon plaintiff's offering to join him at Labrador by some other opportunity, he informed the plaintiff that it was no use for him to go down to Labrador, as Mercer would not let him (Parsons) have anything to do with plaintiff. The plaintiff however did get to Labrador, but was unable to reach Holton, where his master was, nor was he able at that season to obtain any employment there; and so he returned to Newfoundland.

The magistrate (Judge Bennett), who tried the case in Bay Roberts, was of opinion that a good cause of action had been shewn, and he assessed the damages at the largest amount he could in such capacity award, viz, \$25, but he allowed this appeal. I must confess to the point here raised, viz., that there was no actionable wrong done by Mercer to Russell, and that the remedy of the latter was against his master (Parsons), being one of no little nicety and difficulty, and it is with some diffidence that I have decided to support the judgment of the magistrate.

No exception is taken to the form of the plaint (which might be amended if necessary), and judgment is sought upon the facts as laid down by me. *Addison* broadly lays down, not only that an action lies against the defamer at the suit of the person defamed, in cases in which consequential damages have arisen from a libel or slander, through its influence upon the minds and actions of third parties; but that procurement of loss or damage to another, as by instigating servants to desert or leave their employment, or by maliciously inducing a party to break his contract to the injury of the person with whom a contract is made, creates that conjunction of wrong and damage which will support an action.

It is difficult to distinguish in principle between a case such as this of instigating a master to discharge his servant, and that of instigating a servant to leave his master; as the latter is actionable, *e converso*, the former should be so; nor is it easy to discover a difference in principle between a right of action for special damages, arising as the consequence of a slander on account of its influence and effect upon the minds and actions of third parties, and such a case as this in which, not only by secret representations made, but by the wrongful exercise of authority and opportunity a hired servant is deprived of and forced from his employment.

It appears to me that the latter case (that is, the present

one), is much the stronger, for not only is the damage the effect of inducement operating upon the mind of the employer, but the wrong-doer stands as supplier and freighter in such a relation to the employer and the servant that he is enabled by his control and coercive acts to compel the plaintiff into loss of his employment. It seems to me a clear case of a person maliciously (for the law must presume malice, in the absence of all explanation for the high-handed acts in evidence here) inducing a party to a contract to break his contract, to the injury of the other contracting party.

Looking to this general principle, therefore, and in the absence of any case being cited to shew that such a one as the present does not come within the principle, I must uphold the judgment of the court below.

Mr. G. H. Emerson for appellant.

HEARN v. HAWKER.

1888, *May*. HON. MR. JUSTICE PINSENT.

Slander—Non-publication—Privileged communication—Malice—Damages.

The plaintiffs and defendants were fishermen at Labrador. The former accused the latter of feloniously stealing a salmon net mooring and other gear. The plaintiffs denied having taken the property. The defendant justified the charge and set up non-publication and that the statement was a privileged communication.

Held—That bruiting about reports to parties who had no concern in the transaction could not be held to be privileged. The charge without the innuendo of felonious taking is actionable, for slanderous words are actionable when imputing misconduct to a man in his business.

THE slander was for accusing the plaintiffs of cutting and carrying away a salmon-net mooring and buoy-rope of the defendants, meaning that they had feloniously stolen them. The act was charged to have taken place near Venison island, Labrador, last summer, in the course of the fishery. The plaintiffs were partners and sharemen in the neighbourhood, and fished together in the same boat. The net was said to be set on the Eddystone ground, and the act of cutting and taking the mooring was said to have been committed on the 23rd of July.

The plaintiffs denied on oath that they had cut or taken this property; and their uncle deposed that no such property had been brought to his premises when they put in their fish. They

had gone to Hawker about the reports, and he said he had reported they cut and stole the moorings, for he had seen them do it himself.

One of a crew of Mr. Edward Connolly, having a fishing-room four or five miles from defendants, deposed to picking up a mooring, rode, grappell, and buoy-line in Aug. Mr. Connolly confirmed this, and after hearing of the accusations against plaintiffs, returned them to defendant some time in October. He was of opinion from the look of the end of rope saved by defendant from one of the kegs of his salmon-moorings, and of the rope of the moorings delivered up by him, that they were the same, and he understood that other persons who were present when he delivered the property to Hawker were of that opinion. Defendant, when he got this back, said he would be prouder than five pounds if he could clear the fellows (the plaintiffs) of it, as he said he had seen them taking a mooring of his, and he had reported it, and he supposed he would now send them an apology.

Mr. Emerson moved for a non-suit upon the grounds that (1) There was no proof of publication. (2.) That the communication was privileged.

His Lordship said he would call upon the defence, but would consider these points in delivering judgments.

Counsel having then addressed the court for the defence, called the defendant, William Hawker. He swore positively to being on the look-out from the Venison island flag-staff, with a spy-glass, on the morning of the 23rd July, and seeing the plaintiffs come to his net in their bully (boat), and pull the net and its moorings up over the gunwale, and then let the net go. The boat was (as admitted by the plaintiffs) unmistakably different from all others in the neighborhood, from her rig and painting, and was the last of the fishing fleet to leave the Eddy-stone ground that morning. The plaintiffs had formerly been dealers of Mr. Rorke, of whom defendant was the Labrador agent. He said, it was before the comparison of the ropes that he made some such remarks as those deposed to by Connolly—that after he saw the ropes he was convinced that they belonged to different moorings, and that returned by Connolly was one he had lost earlier in the season.

Part of the salmon-boat crew of the defendant deposed to their having been at the nets early in the morning, of having overhauled them, and having left them moored all straight. That defendant after their return, and after his coming from

the look-out, ordered his crew off to the nets again to see if anything was wrong. They went out and found that the mooring had been cut and the salmon-nets adrift, and the mooring buoy-rope and grapnel were gone. They had seen the plaintiffs on the ground in the boat, when they were overhauling the net in the morning.

Other witnesses were called to give their opinion about the rope.

The judge, in summing up, said that he had never in his recollection, being placed in so great a difficulty in the determination of a matter of fact, and he regretted that a jury had not been engaged in the case; but, as both law and fact had been left to him, he must grope his way through the maze of evidence to the best of his judgment. As to the objections taken at the close of the plaintiff's case, he was of opinion that there was sufficient evidence to prevent a nonsuit. It was true that none of the persons in whose hearing the charge had been originally made were produced as witnesses; but after the reports came to be matter of inquiry, the defendant admitted his utterance of them, and justified and repeated them. Then as to its being a privileged communication, it would be going very far to say that bruiting about reports of that kind to others who had no concern in the transaction or in the inquiry could be held to be privileged. Moreover if the plaintiff's case was correct there was proof of express malice. Again he would hold that it would be unnecessary to prove the innuendo of a felonious taking in a case of this sort. The charge without the imputation of felony would be actionable, for although slanderous words only were not generally actionable unless imputing crime or accompanied by special damage, they were so; also, when they imputed misconduct in a man's business or occupation; and it would be difficult to conceive anything more injurious to a fisherman in his business than a charge of this sort, even if the act fell short of larceny. His lordship then reviewed the evidence and observed that the conviction was forced upon him that the defendant was correct in his evidence, at least to the extent of seeing the plaintiffs come to his net and moorings, take them out of the water and meddle with them. The confirmation of the charge against the plaintiffs was to that extent overwhelmingly strong and conclusive. There was a possibility that the moorings, although severed, had been left on the ground, and that those brought in by Connolly were the same, and not the moorings lost earlier in the season. He would give the plain-

tiffs the benefit of a possible doubt upon this point, and he must, therefore, find against the defendant for having extended his accusation to a charge of theft; but, as from the misconduct of the plaintiffs, there could be no malice in the defendant's charge beyond that of a technical character, the judgment of the court would be for *twenty cents* damages for the plaintiffs without costs

Mr. G. H. Emerson for defendants.

McDOUGALL *v* GRIEVE.

1888, *August*. SIR F. B. T. CARTER, C. J.

Practice—Policy of insurance—Arbitration clause—Rule nisi for stay of proceedings—Order for arbitration—Award, a condition precedent to right of action.

A trader insured his vessel in a Mutual Insurance Club, the rules of which contained a clause to the effect that if any difference should arise between the parties, such difference should be referred to arbitration, and such arbitration was a condition precedent to the right of the insured to maintain an action. The insured refused to appoint an arbitrator and insisted on prosecuting his action for his insurance, contending that the arbitration clause or rule was illegal and void and ousted the court of its jurisdiction. The defendant company obtained a rule *nisi* for a stay of proceedings and a reference to arbitration. On coming up for argument,—

Held—That no action could be brought until every dispute that might arise under the policy had been settled by arbitration. Parties may in a contract make what they please a condition precedent, but it must be shewn that they so intended. Reference to arbitration ordered accordingly.

THIS is an action brought against the defendant as a member of the St. John's Mutual Insurance Company, to recover his proportion of the alleged total loss of a vessel of the plaintiffs, insured in said club. There are no pleadings. The defendant obtained a rule *nisi* which was argued in the July sittings for a stay of proceedings, and a reference of the case to arbitration, under the 19th rule of the club, which is as follows:

"If any difference shall arise between the owner of any vessel insured in the club, and the committee in relation to any claim for loss or damage, or any other matter affecting the insurance, except in such cases where there is reason to suspect fraud, such difference shall be referred to the arbitrament and award of three arbitrators, one to be chosen by the committee and one by the insured; and in the event of either party refusing, for fourteen days after the notice of the appointment of the arbitrator by

the other party, to appoint another, the other party may appoint a second, and in either case the two appointed shall forthwith appoint a third, and the said arbitrators shall consider and decide upon the matters in dispute according to the terms and conditions of these rules and the laws of this colony, and the award of the said arbitrators, or any two of them, shall be final and binding upon both parties. And it is hereby agreed and declared that the insured shall not be entitled to maintain any action at law, or suit in equity, under these rules, until the matters in dispute shall have been referred to and settled by arbitrators appointed as hereinbefore specified, and then only for such sum as the arbitrators shall award ; and the obtaining of the decision of such arbitrators on the matters in dispute is hereby declared to be a condition precedent to the right of the insured to maintain any such action or suit."

In accordance with this rule, the committee appointed an arbitrator on the 26th May last, notice of which was given to the plaintiffs, but they have not reciprocated by the appointment of another, and insist on prosecuting the action. The plaintiff's contention is, that the rule is illegal and void, as it substantially ousts the court of its jurisdiction, and counsel cited cases in support of that principle. On the other hand, it was contended that the rule was valid and binding in law and in equity, and could be enforced by the court and referred to several recently adjudicated cases. No doubt, formerly, agreements to refer disputes to arbitration were to some extent regarded as encroachments on the proper authority of courts of justice by the substitution of a "domestic forum" of the parties own making, and while at common law such an agreement would not supersede or oust the jurisdiction of the courts, and gave only a right of action for a breach of it, yet in modern times, and especially since the passing of the common law procedure act, the courts have, with few exceptions, compelled parties to abide by their contract or agreement, as to the mode and manner of adjusting differences between them, whether existing or prospective. The 126th section of chapter 20, of the con. stat., 1872, is a transcript of the 11th section of the Imperial common law procedure act, 17th and 18th Vic., cap. 125, wherein it is provided that whenever the parties to any deed or instrument in writing or any of them have agreed or shall agree that any then existing or future differences between them, shall be referred to arbitration, and any of them shall commence an action against any other of them, the court or a judge on being satisfied that no sufficient reason exists why such matters cannot or ought not to be referred to arbitration, according to such agreement, and that the defendant is willing to concur in all acts necessary to carry out such arbi-

tration, make a rule or order staying all proceedings in such action or suit on such terms as to costs or otherwise as to directing a reference as hereinbefore provided as to the court or judge may seem fit. *Provided, that any rule or order may at any time afterwards be discharged or varied as justice may require.* Upon this carefully worded section, *Pollock* on the principles of contract, 3rd ed., p. 308, says, gave a discretion which amounts in practice to enabling courts and judges to enforce the agreement, and has as a rule been exercised both at law and in equity in the absence of special circumstances, such as a case where a charge of fraud is made, and the party charged with it desires the charge to be public, or when the defendant appeals to an arbitration clause not in good faith, but merely for the sake of vexation and delay. (*Willisford v. Watson*, 14 Eq., 572, 8, ch. 473; *Plews v. Baker*, 16 Eq., 564; *Russell v. Russell*, 14 ch. D. 476, 14 Eq., 578. The enactment applies only where there is at the time of action brought an existing agreement for reference, which can be carried into effect,—*Randall & Co. v. Thompson*, 1 Q. B. D., 748. It will be observed that the rule in this case prudently excepts cases of fraud.

I have carefully examined all the leading cases on this important subject referred to in the latest editions of the text books of recognized authority in the profession.—*Russell on awards*, 1882, Ed.; *Pollock*, before cited; *Addison on contracts*, Ed. 1883. It will be observed there are two leading principles applicable to the question of reference by the agreement, such as that it shews it was the *intention* of the parties, the difference in question was to be disposed of by arbitration, and that it was not a subsequent clause collateral to the contract to pay for the loss (or other matter in question); as to the first, L. J. Blackburn, in *Brounstein vs. the Accidental Death Company*, says: "I quite admit parties may make what they please a condition precedent, but it must be shewn that they so *intended*"; and the case of *Collins vs. Locke*, P. C., 1879, 4 app. cases, 674; *Dawson vs. Fitzgerald*, 1 Ex. D. 257, on appeal, are authorities for the other.

In passing, I may observe that *Collins vs. Locke* affirms the principles laid down in the great case of *Scott vs. Avery*, 5, H. L. cas. 811, (to which I shall hereafter refer), in these words:—"Since the case of *Scott vs. Avery*, in the House of Lords the contention that such a clause (*i. e.*, referring disputes and differences under a contract to arbitration) is bad as an attempt to oust the court of jurisdiction, may be passed by." *Addison*, in

page 114), thus summarizes the law and practice, which will be found to be borne out by reference to the cases in the foot notes

It is (the editor Horace Smith, a high authority, says) difficult to reconcile and give effect to two propositions so nearly in direct opposition, as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between the parties it shall be referred to arbitration; but the fair result of the authorities is, that if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until the condition has been complied with; but if on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration contained in a distinct collateral clause to the other, then the contract for reference will not oust the jurisdiction of the courts, or deprive the party of his action.—*Elliott vs. The Royal Exchange Insurance Company, L. R. 2, Ex 237-242*. In that case, which was an action on a fire insurance policy, it was stipulated that in case any difference should arise touching loss or damage, such difference should be submitted to arbitrators, whose award in writing should be conclusive and binding on all parties; but if there should appear any fraud or false swearing, the claimant should forfeit all benefit of his claim; the defendant pleaded this article and that the plaintiff had not submitted the matter to arbitration; it was held on demurrer, the covenant was only to pay the adjusted loss, and that the plaintiff had no cause of action. In *Cope vs. Cope, 52, L.J. 607*,—in partnership articles it was provided that all disputes or questions respecting the partnership affairs, or the construction of the articles, should be referred to arbitration.—*per Kay, Justice*. These gentlemen seem to have provided with anxious care that such questions as those which have now arisen should not be made the subject of litigation; the duty of the courts is to carry out their deliberately expressed intentions, and make the usual order for stay of proceedings. In *Gillett vs. Thurnton, L. R. 19, Eq. cases 599, 1875* (another partnership case), by a clause in the articles it was agreed to refer all doubts, differences and disputes to arbitration, or any clause, matter or thing, or the construction or operation thereof, and in all respects to conform to the common law procedure act, or any subsisting statutory modification thereof; on a bill with objections argued, the rule to stay and refer was made

absolute on all points: the judgment remarks, "It was contended these were questions between the parties which required declarations to be made by the court, but the matters which it is said necessitate such declarations are matters which the parties have agreed should be referred. They have agreed that differences as regards the construction of the deed should be referred, and the arbitrators must as I (V. C. Hall) apprehend, as was said in *Willesford vs. Watson*, 8 Ch. 473, enter into the whole matter, construe the instrument, and decide whether the thing complained of is inside or outside the agreement; the court will not limit the arbitrator's power to those things which are determined by the court to be within the agreement." In *Brounstien vs. The Accidental Death Company (Supra)*, for any injury travelling on a railway, there was a condition in the policy that in case of a difference of opinion as to the amount of compensation payable in any case, the question should be referred to arbitration of a person named by the secretary of the Master of Rolls, and all expenses and costs should be subject to the decision of such arbitrator, and the award to be made was to be taken as a final settlement of the question: held that a reference to arbitration in the manner provided was rendered a condition precedent to bringing an action for an injury within the policy. *Scott vs. Avery (Supra)* was an action on a policy, in a mutual insurance company, on a ship for total loss; one of the conditions was that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee; but if a difference should arise between the insurer and the committee, "relative to the settling of any loss or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration in a way pointed out in the conditions, "provided always that no insurer who refuses to accept the amount settled by the committee, shall be entitled to maintain any action at law or suit in equity on his policy until the matter has been decided by the arbitrators," and then only for such sum as they may award, and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action. This is substantially the same as rule nineteen of the present parties club; the conditions were set forth in a plea in bar, and the Court of Exchequer held them illegal; this decision was reversed by the Exchequer Chamber, which held they were legal, and the House of Lords on a writ of error affirmed the Exchequer Chamber, holding that the conditions were law-

ful, and that (even should the difference refer to other matters than those of mere amount) till award made no action was maintainable.

Prior to this are numerous decisions referred to in the case, that such a stipulation would not have been a bar to the action or oust the courts of their jurisdiction. Again, in *Tredwell vs. Holman*, 1 H. & C. 72, a policy was subject to the following rule, "All average claims and claims of abandonment shall be adjusted and settled conformably to the custom of Lloyd's, or the Royal Exchange, by a professional average stater, but should the committee or the assured be dissatisfied with the adjustment, they may refer the same to two professional average staters, or to other competent persons, with power to appoint an umpire, the award of any two to be final; and all other cases of dispute of whatever nature shall be referred in like manner, but the committee and assured, by mutual consent, may refer all such adjustments or disputes to one person only, whose award shall also be final, and no action at law shall be brought until the arbitrators have given their decision": held that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration, in pursuance of the rule. This case has been contrasted with that of *Horton vs. Sayer*, 4 H. & N. 643 (Baron Martin delivered the judgment of the court), "In which the agreement was that all matters in difference should be determined by arbitrators, and that the parties should not prosecute any action at law or equity without first submitting to arbitration, and that was held an absolute agreement to oust the superior courts of their jurisdiction and therefore void. *Tredwell vs. Holman* resembles *Scott vs. Avery*; those cases have established this distinction, that a mere agreement to refer to arbitration will not oust the superior courts of their jurisdiction, but when the agreement is, that no action shall be maintained until the amount in dispute has been ascertained by an arbitrator, that is binding on the parties. The circumstance connected with the case of *Edwards vs. Aberayon Mutual Ship Insurance Society*, L. R. 1, Q. B. D. 563, were peculiar; by one of the rules of which the directors should decide claims and disputes, and that aggrieved members might appeal for reconsideration of decisions first to the directors themselves, and then to the whole society; and also that no member should be allowed to bring or have any action, suit or proceeding, or other remedy, against the society for any claims or demands upon or in respect of the society

or the members thereof, except as therein provided. Upon the loss of the ship, the plaintiff was refused his claim upon the policy by the directors twice, but made no appeal to the whole society. It was held by a majority of the Exchequer Chamber (over-ruling the Queen's Bench) that the plaintiff was not bound by the decision of the directors, and that the action was maintainable. There was however a majority of the judges who considered the rule to be an estoppel, but the same majority including one of the former, decided that the conduct of the directors in the so-called arbitration had made it inequitable to submit his claim to their determination. To come to a decision under these circumstances, as set out in favor of their own society and against the plaintiff without hearing him, or giving him an opportunity of being heard was contrary to every principle of justice and ought not, I think (said Amphlett B.), who was one of those who considered the rule binding but for the misconduct of the directors, whose duties were analogous to those of an arbitrator, to be held by any court of law or equity to be binding. Besides, as was further stated, there was no difficulty about the amount, as it was found in the case submitted that the defendants then admitted, contrary to what their directors had determined, a total loss of the vessel by the perils of the sea. Justices Brett and Kelly, C. B., questioned whether *Scott vs. Avery* included disputes beyond ascertaining the amount of damages in the particular manner stipulated. The Exchequer Chamber could not, of course, impeach or weaken the legal effect of that decision, and it is interesting to read the opinions of the judges on the questions which the House of Lords, through the Lord Chancellor, put to them, who differed among themselves, especially the judgments of the Lord Chancellor Cramworth and Lord Campbell, in which Lord Brougham concurred; the Lord Chancellor observed, "Was not this a contract where no right of action existed till the amount of damages had been ascertained? It certainly seemed to be so, and it was by the clause itself made a condition precedent to the right of a member to maintain an action or suit. The committee and the suffering member might disagree as to the amount to be paid. If so, an arbitration was to settle that amount, and it was the amount thus settled and no other that was to be recovered; that was the meaning of the parties, and he thought they had stated it in clear terms. It had been argued that the matter to be settled by the arbitrator was not confined to the amount, and therefore the covenant was bad. *If not*

so confined, that would not affect his view of the case. Parties might agree that no right of action should arise between them until J. S. had determined whether the contract had been fulfilled and what damages had been sustained by its breach; and if they did so agree no right of action would exist until J. S. had so decided." Lord Campbell was clearly of opinion this was a contract that no action should be brought until every dispute that might arise between the suffering member and the committee had been settled by arbitration. Was such a contract illegal? It was contended to be so on the ground of public policy. What pretence was there for that argument? The public could not be injured by such a contract; there could be no injury to the public in an insurance company contracting that no action should be brought against it, the costs of which might be ruinous, but that every dispute should be referred to a domestic tribunal which might speedily and economically determine the dispute. Public policy seemed to him to require that such a contract should be enforced. The doctrine had its origin in the interests of the judges; there was no disguising the fact that, as formerly the emoluments of the judges depended mainly or almost entirely on fees, and that they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble there for a division of the spoil from a *latitat capias*, &c., and had great jealousy of arbitration, whereby Westminster Hall was robbed of these cases which came not into the several courts there; therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. Lord Campbell referred to a case of *Brown vs. Overbury*, decided in 11 *Ex.*, 715, while *Scott vs. Avery* was pending, in support of his position, where, in an action on a horse race, one of the articles was that no action should be brought till the stewards had decided, and the court held that the plaintiff who had brought an action, though the stewards had not decided, was rightly non-suited.

I may also refer to the recent case of *Kirk vs. E. & W. India Dock Company*, 55 *L. T. R.*, 245, on appeal, as indicating the disposition of the courts in not interfering with arbitration references. On a submission under a contract the court of appeal affirmed the principle that an arbitrator cannot be interfered with, unless he exceed his jurisdiction, or is guilty of moral misconduct; he is the judge of fact and law, and to interfere

with him during the proceeding for misreception of evidence would be fatal to the whole system of arbitration.

The rules in this case constitute the contract of the parties, and which each had thus undertaken, when entered into, to observe. This action is brought to recover for a total loss, a question resulting in amount or not as may be determined by the evidence in the estimation of independent arbitrators, to be mutually chosen. I think rule 19 has been carefully prepared, and, so far from its infringing any principle of law, in my opinion it follows in the track of what may be now regarded established principles. I ought not to omit a reference to the proviso in the 126th section of chapter 20, of the consolidated statutes, 1872, which apparently confers extensive powers in subsequent dealing with any rule or order that may be made.

The principle involved in this case appeared to me to be of so great importance that I considered it advisable, in the interests of justice, to carefully investigate the whole subject. There has been nothing shown, beyond the technical objection contended for, that would unfairly prejudice the interests of the plaintiffs in carrying out the contracts in this case. I am of opinion the rule should be made absolute with costs. My brother judge concur in this decision.

Mr. G. H. Emerson for plaintiffs.

The Attorney General for defendant.

1888, *September*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Territorial jurisdiction — Legislature of Newfoundland — Bays and Headlands — High seas—Taking seals within the three mile limit—Appeal.

It appeared that the defendant, who was the master of a British ship, killed and took on board his vessel seals previous to the date fixed by the Legislature of Newfoundland for the taking of same. The seals were all taken at a considerable distance beyond the three mile limit, from headland to headland, on the Newfoundland coast. In an action for the penalties under the act, the jurisdiction of the Newfoundland courts was pleaded, i. e., that the seals were all taken outside the three mile limit on the high seas. The magistrate dismissed the complaint.

Held—On appeal, (Pinsent, J., differing) that the territorial jurisdiction of the courts of Newfoundland for such offences as that complained of, extends to three miles outside of a line drawn from headland to headland of the bays of Newfoundland and no further. The acts of the local legislature have effect and operation to that extent only. Appeal dismissed.

THE plaintiff is the appellant from a decision of a stipendiary magistrate in the Central District, before whom, on the 27th February last, a complaint was made by plaintiff, who claimed, as well for himself as the receiver general of this colony, against the defendant, as master of the steamer *Terra Nova*, the sum of \$20,000, for that the crew of the said steamer did, within twelve months next before the commencement of this suit, viz.: on the 11th March, 1887, kill 5,000 seals contrary to the statute 42nd Vic., cap. 1, whereby the defendant became subject to the penalty of four dollars for each seal so killed, &c. The defendant appeared on a summons by counsel, who contended *in limine* that the said statute which permitted proceedings to be taken within twelve months from the commission of the offence, was, so far as concerns the time within which proceedings must be taken, repealed by implication by the statute 50th Vic., cap. 23, sections 2 and 7. On these grounds, after hearing counsel for both parties, the complaint was dismissed.

The plaintiff appealed to this court, which, after argument, directed that the record and proceedings be remitted to the magistrate to hear and determine the same under the provisions of the said statute 42nd Vic., cap. 1, on which the information was laid and the penalties alleged to have been incurred. Here I may mention that the 50th Vic., cap. 26, passed on the 18th May, 1887, which it was contended had impliedly repealed the other, (there being no express repeal of any part of it), among several new provisions repeated the prohibition to kill seals

before the 12th March or after the 20th April in any year, and added, "*Nor shall any seals so killed be brought into any port in this colony or its dependencies aforesaid, in any year, under a penalty of four dollars for every seal so killed, to be recovered from the master and crew and paid to any informer who shall sue for the same in a summary manner before a stipendiary magistrate.*"

In the first Act, on which the complaint was based, there was no reference to the bringing of seals so killed into port, and the parties liable for penalties were different in some respects from those named in the latter Act; there is also a difference in regard to the time of preferring a complaint and the right and manner of appeal. There is nothing to indicate its having or intended to have a retrospective operation; the right of appeal under it is conditional as to amount, and given only to a defendant, not to the informer, although the full penalty on a conviction would by it go to to him, while, under the first Act, it would go in moieties to him and the Receiver General of the colony. Any complaint *under its provisions* must be made within three months of the time of the alleged breach; and by section 6, vessels shall be deemed to be on a second or subsequent trip if they shall engage in killing seals *on the coasts of this island and its dependencies* after clearing and sailing for Davis Straits or Greenland fishery. It is difficult to imagine on what grounds a party could have successfully contended for an implied repeal by the latter Act, which could affect suits for penalties incurred, if at all, before it came into operation, viz, 18th May, 1887. After the rehearing the magistrate certified: "I have taken evidence by which it has been shewn to me that the seals, the subject of the complaint, were killed beyond the limits of the territorial jurisdiction, and I have again to dismiss the complaint upon that ground"; hence this appeal, but of what or whose jurisdiction was not stated.— Since the argument before this court I have received the evidence taken before the magistrate hereinafter referred to. The heading of the notes of evidence states: "Mr. McNeily takes the objection that the seals (if any) caught were so caught outside the jurisdiction of this court (magistrate's), *i. e.*, outside the three-mile limit on the high seas"; whereas the argument throughout before this court on the re-hearing proceeded on the ground that the legislature had not authority to enact a law which would subject a party to penalties for seals killed outside the limits of its jurisdiction. We are all aware it is

the frequent practice, and legally so, for justices of ordinary limited territorial jurisdiction, under the Imperial Mercantile Marine Act, to adjudicate on offences committed on board a ship navigating on the high seas,—(see sections 517, 521, and other sections of the 17th and 18th Vic., cap. 104) The complainant, in support of his suit for the penalties, did not, as appears from the notes of the magistrate, give or offer to give any evidence, but Mr. McNeily, being directed “to prove his allegation aforesaid, in order to sustain his objection, called Captain Fairweather, the defendant,” so that, instead of the complainant sustaining his complaint according to the usual course of procedure, the *onus* was shifted on the defendant to maintain his innocence, which he apparently accepted. The substance of the evidence given by the defendant and his steward, who kept a diary for the defendant, which he produced, was that the steamer left St. John’s for the prosecution of the seal-fishery early on the 10th March, 1887; on the 11th, about 3 o’clock, p. m., fell in with some seals and killed several hundred; on the evening of the 12th had 1,260 on board, none taken that day; from thence to 21st March were jammed in the ice. All the seals were killed outside the three-mile limit, perfectly clear that he was at least ten to fifteen miles off a headland line drawn from Cape Freels to Cape Bonavista.—When the seals were taken he was steering a course to clear the Funks, and was outside the mark on the chart produced. He further stated that he was altogether ignorant of the law forbidding seals to be killed before the 12th March, but he was aware of that against taking immature seals, and weighed two or three of them to ascertain their weight.

It was admitted on the argument that the steamer was British owned, and registered at Dundee, Scotland, where the owners and master reside, also several of the crew, who were engaged there. Stores for the sealing voyage were brought from there; the bulk of the crew were engaged in this colony, who were supplied by outfitters on the security of the voyage; steamer cleared from St. John’s for the seal-fishery, and returned there after the voyage for the purpose of manufacture and shipment. On the rehearing both counsel, so far as it favourably bore on their respective cases, argued for the implied repeal of the former act; but their positions, especially that of complainant, had become greatly changed since the hearing of the first appeal, when his counsel argued otherwise. For this, among other reasons, I have made particular reference to the

two acts. Respecting the jurisdiction of courts in this colony, by the Imperial act 5th Geo. IV, cap. 67, this Supreme Court has expressly conferred on it, besides other powers specified, "Jurisdiction in all cases of crimes and misdemeanors committed on the banks of Newfoundland, or any of the seas or islands to which ships or vessels repair from Newfoundland for carrying on the fishery" In *Phillips vs. Eyre*, *L. R. 4, Q. B. 225*, on appeal *6 L. R. 261*, the question there was, whether an act of the Jamaica legislature, indemnifying Governor Eyre and all others with him for acts committed by them in the suppression of rebellion, could be effectually pleaded to an action taken in England for assault and false imprisonment during the progress of and in arresting the rebellion. It was contended that the act was *ultra vires* the territorial jurisdiction of the local legislature; held that an act of the local legislature lawfully constituted, whether in a settled or conquered colony, assented to by the Crown, has to matters within its competence and *the limits of its jurisdiction*, the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament. In giving judgment on the appeal, Willes, J., for the court, quoted the language of Lord Wensleydale in *Kielly vs. Carson*, *4 M. P. C.*, at p. 84, "that as regards the prerogative the Crown had the right of creating a local legislative assembly in Newfoundland with authority, subordinate indeed to that of parliament, but supreme within the limits of the colony." And as to those limits, I cannot do better than quote the language of Chief Justice Hoyles in his judgment in the case of the *Anglo-American Company vs The Direct United States Company*, affirmed on appeal to the Privy Council: "I hold that the territorial jurisdiction of the Sovereign extends to three miles outside of a line drawn from headland to headland of the bay,—*Wheaton, Kent, &c.*; that the local government, being the Queen's government, representing and exercising within the limits of the Governor's commission, which contains nothing restrictive on this point, his authority is in this respect the same with the Imperial government; that this authority existed with the local government prior to the grant of representative institutions in the colony; that such grant, while it enlarged the powers, neither added to nor lessened the territorial jurisdiction of the local government; and that, subject to the Royal instructions and the Queen's power of dissent, *the acts of the local legislature have effect and operation to the full extent of that territorial jurisdiction.* (I may add, subject also to the

control of the Imperial parliament supra, the jurisdiction of the Supreme Court is in some respects even more extensive)."

Now, without entering further into its history, we are judicially aware the legislature of this colony has been duly constituted, and may assume that the act 42nd Vict., cap. 1, has received the Royal assent or been left to its operation. No nation has any right of jurisdiction at sea, except it be over its own subjects or its own vessels, and so far territorial jurisdiction may be considered as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.—*Kent's Com. Grotius, Vattel*. The free use of the ocean for navigation and fishing is common to all mankind.—*Kent's Com.* A ship, public or private, on the high seas is, for the purposes of jurisdiction over crimes committed therein, a part of the territory to which the ship belongs.—*Reg. vs. Sattler and Lopez, D. & B., C. C. 525*; and several Imperial acts have been passed from time to time having special reference to offences committed on board British ships and by British subjects abroad—18th and 19th Vict., cap. 91, sec. 21, and the 12th and 13th Vict., cap. 96,—by which jurisdiction is given to the colonies for the prosecution, trial and punishment of offences committed on the high seas, in the same manner as if such offence had been committed upon any waters within the limits of such colony.

Now, has the legislature of this colony authority to pass an act conferring jurisdiction of the like character over persons on board a ship on the high seas beyond colonial limits, whether registered in this colony or other British port? I apprehend it has not. Then by what authority can it prohibit or confer the right of killing seals beyond its territorial limits. If it could do so with respect to the killing of seals, and having thus overstepped its recognized limits, where, I may enquire, as regards locality and distance, will you confine the sovereignty of the Newfoundland legislature to give effect to its ordinances.

Enjoining discipline under penalty on board a ship is not the same thing as making it penal to do an act unconnected with discipline or crime outside the ship on the ice or the sea at a place common to the whole world, and beyond the reach of the municipal law of the colony. The *Terra Nova* is a ship of the British nation, and as such the Imperial Parliament would unquestionably be competent to give effect to an act prohibiting with penalties the killing of seals or such like, at a specified

time, anywhere over the sea, by persons on board said ship, but that is from supreme, and unlike colonial, limited authority. The distinction must always be borne in mind of acts committed *within* and acts *without* limits; as is shewn in *Phillips v. Eyre* the acts complained of were within, which gave the legislature plenary authority, and its ordinances were regarded as part of the law of England; and so what is done within the limits of the jurisdiction of a foreign country and under its authority, is regarded as lawful by the comity of nations. The act committed and informed against in this case, it will be observed, was beyond the limits. There have been several international conventions for the suppression of piracy and slavery, also concerning fisheries and trading matters, in which Great Britain has been a party, without which the subjects and ships of other nations could not be controlled on the high seas; but there is none such, of which I am aware, relating to the prosecution of the seal fishery in any way applicable to this colony, nor is there any Imperial act on the subject.

In the amended Act of 1887, the legislature, as if doubting, or at any rate *ex abundanti cantela*, made the aforesaid addition to the clause in the first Act, prohibiting the bringing of the seals so killed into any port in this colony or its dependencies; this apparently gives cognizance of the offence to local jurisdiction; but that does not apply to the present case, save the inference which may be drawn from it, and this may be taken in connection with the part cited from the 6th section of the same Act.

The evidence given before the magistrate was not in any manner contradicted or impeached, and, as by that it was clearly proved that the alleged offence was committed at a considerable distance beyond the territorial extent of colonial jurisdiction, I am of opinion that the adjudication of the magistrate was rightly made in dismissing this suit.

HON. MR. JUSTICE PINSENT:

The appellant in this action sued the defendant before one of the stipendiary magistrates for the central district.

The magistrate (Judge Conroy) before whom the proceedings were taken by virtue of the 8th section of the same statute, and from whose decision an appeal lay to this court under section 9, held that the act of the defendant having, as the magistrate says, "been committed, *i. e.*, begun and completed

(so far at least as 42nd Vic., cap. 1, applies) in a region beyond the limits of our territorial jurisdiction," no offence had been committed in violation of the enactment, and that, consequently, there was no power in him to entertain the prosecution for the penalties. He confines, as he says, "the competency of the colonial legislature to enact municipal laws governing ships domiciled in the colony, as the Dundee ships undoubtedly are, to the commission of acts, part of which, whether initial or final, is accomplished in the colonial territory." The decision of the court below was sweeping in holding as null all legislation which affects any person in his conduct outside the "three-mile limit," a position utterly destructive of some of the most useful powers of the legislature, particularly in a maritime country.

Besides this, the case was treated at our bar on the part of the defendant as if it were a question of international law and right, but truly there is no such international contention involved in it.

The high seas off the coasts of this island and beyond a league from the shore, where the seals (for the killing of which the penalties here sought to be recovered are said to have been taken) are not the possession or property of any other nation, and consequently no international conflict arises here. The question is one between our municipal law and subjects of the Crown of England here, and by *subjects* I mean persons who are either permanently or transiently in subjection to the state and under the control of its laws. The only *quasi* international question capable of being suggested here is as to the extent of the power of the local legislature over British non-resident subjects, which, with regard to those who bear the relation to the colony in which the defendant, his ship and ship-owners stand in this case, may be exercised on the general principles governing the parliament of England with regard to persons standing in similar relations to the English community.

With regard to jurisdiction, Story lays it down consistently with the older, as well as with contemporaneous authorities, that "All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof"; and that learned author quotes Bullenoi as holding that a Sovereign "may of strict right make laws for all foreigners who merely pass through his dominions, although commonly this authority is exercised only as to matters of police."

In *The Hally*, L. R. 2, J. C., 292, it is said in the judgment of the judicial committee that "The right of all persons, whether British subjects or aliens, to sue for damages in English courts in respect of torts committed in foreign countries has long been established."

As to the effect of an English enactment upon foreigners, Lord Cransworth said in *Jeffreys vs. Boosey*, 4 H. L. C. 955:—"When I say that the legislature must *prima facie* be taken to legislate for its own subjects, I must be taken to include, under the word 'subjects,' all persons who are within the Queen's dominions, and who thus owe her a temporary allegiance."

In the *Sussex Peerage* case it was held that "The British parliament possesses the power to impose restrictions and incapacities upon any British subject, which shall operate upon him anywhere." This dictum, taken in its largest sense, is, of course, only applicable to the paramount power of the British parliament over all subjects of the Crown in every part of H. M. dominions and elsewhere.

A British statute can bind the personal property of a British subject wherever situate, not only on the high seas, but in a foreign country.

In *R. v. Keyn*, L. R. 2, Ex. 63, a question of criminal jurisdiction was raised with regard to a foreigner on board a foreign ship at sea, but within the three-mile limit, and it was there decided by a bare majority of the judges that the prisoner, who had been found guilty of manslaughter, could not be convicted and sentenced by our courts; and it was said by Sir R. Phillimore, "there appears to be no sufficient authority for saying that the high sea was ever considered to be within the realm," or "that the realm of England extends beyond the limits of counties," (which extend to low-water mark only).

The legislature, however, stepped in, and it was enacted by 41st and 42nd Vic., cap. 73, that "an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea, within the territorial waters of Her Majesty's dominions, (by sec. 7, within one marine league of the coast measured from low-water mark), is an offence within the jurisdiction of the admiral, although it may have been committed on board a foreign ship, and the person who committed such offence may be arrested and punished accordingly."

In the case of the *Queen v. Keyn*, it was said by Cockburn, C. J., "If the legislature of a particular country should think fit by express enactment to render foreigners subject to its law

with reference to offences committed beyond the limits of its territory, it would be incumbent on the courts of such country to give effect to such an enactment."

So much in explanation of what a British subject is, how far he may be affected by British statute law, and the obedience English courts of justice are bound to pay to legislative enactments even if they exceeded the extent to which they are usually confined and were made to extend to foreigners beyond the jurisdiction.

It is quite unnecessary for the purposes of this case to confine the principle of our adjudication to mere obedience to a law which may be found upon the statute book, and which we might be constrained to administer because it is there. Concerning such a necessity, cases may be imagined in which it might be incumbent to determine whether the colonial legislature had exceeded its powers by conflicting with the superior legislative powers of parliament, or in otherwise going beyond the scope of its authority.

For the purpose of clearly ascertaining and accurately defining the position of the defendant in this case, I put to counsel, in the course of the argument, certain questions, in the answers to which they concurred, and which are as follows:—(1) the ship in which the defendant was engaged in prosecuting the seal fishery was registered in Dundee; (2) her owners are resident there; (3) the defendant belongs to Dundee; (4), the crew are engaged partly in Dundee, and partly, but principally, in Newfoundland; (5), the ship brings her stores from Dundee; (6), her crew is, under arrangement with the owners, mainly supplied for the sealing voyage in this colony by suppliers who give credit to the men on the security of the voyage; (7), the ship clears from the port of St. John's, Newfoundland, for the seal fishery; (8), the ship-owners and outfitters of the ship have an establishment and factories in St. John's for carrying on the seal fishery and for manufacturing the produce of the voyage; (9), the seals are brought into this port for manufacture, and afterwards for shipment away.

Vattel says, "the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights it enjoys." Rutherford, commenting on Grotius, has observed "though there can be no doubt about the jurisdiction of a nation over the persons which compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself."—*Wheaton*, 209.

While it is true that the ocean is not capable of private dominion, and is the subject of free navigation to all nations, it is established by the highest authorities upon the laws of nations that ships are in all places the *quasi-territory* of the states to which they belong, and that all persons engaged on board of them are subject to the laws and ordinances of those states. It was said *per curiam*, in *R. vs. Desley*, 29 L. J. (M. C.) 101: "It is clear that an English ship on the high seas out of any foreign territory is subject to the laws of England; and persons, whether foreign or English on board such ship, are as much answerable to English law as they would be on English soil. The same principle has been laid down by foreign writers on international law."

In *Keyn's* case, Cockburn, C. J., in the course of his judgment, said: "If there is one proposition of international law more settled and indisputable than another, it is that the ships of each nation on the high seas carry the law of their own nation with them and that those on board of them are answerable in respect of offences committed in them to the law of such nation alone."

The Imperial parliament has, indeed, not confined its legislation over foreigners to the period of their service in a British ship; for example, the statute 18 and 19 Vic. c. 91, enacts that "if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found (that is to say, is found to be at the time of his trial) within the jurisdiction of any court of justice in H. M. dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits."

By 17 and 18 Vic, c. 104, "All offences committed at any place out of British dominions by any seaman who, at the time when the offence was committed, or *within three months* previously had been employed in any British ship," shall be tried at the Old Bailey; and see *R. v. Anderson*, L. R. I. C. C. R., 161, where this principle is discussed.

But upon the question of jurisdiction over British ships and those concerned with them, and the extent to which it is exercised, it is needless to cite instances or to do more than to refer generally to the voluminous legislation referred to by the Merchant Shipping Acts, the laws relating to trade and navigation,

and for the regulation of fisheries of all kinds both at home and abroad.

The length to which English legislation has undertaken to go is strongly exemplified by the statute 27 Geo. III., c. 53, under which offences committed *in any places not within the dominions of the Crown*, (and not subject to any other power), committed by the master or crew of any British ship, or by *any person sailing or belonging to any such ship, or that shall have sailed in or belonged to and have quitted any British ship to live in any of the said places*, may be tried in any of the possessions of the Crown abroad.

In the act 5 Geo. IV., c. 67, we have an apt and notable instance of the exercise of Imperial legislation in the power conferred upon this Supreme Court, upon which, amongst other things, is conferred "jurisdiction in all cases of crimes and misdemeanors committed on the banks of Newfoundland, or any of the seas or islands to which ships or vessels repair from Newfoundland for carrying on the fishery."

Having thus inquired how far the operation of enactments may extend (and of course the authorities cited must be taken with the necessary qualifications in regard to colonial legislation), it will be needful to ascertain what are the scope and operation of the statute under which the present prosecution is had.

The first enactment of the colonial legislature for the regulation and prosecution of the seal-fishery, of which the act under consideration is a continuation and amendment, was the 36th Vic., cap. 9 (1873), entitled "An Act to regulate the prosecution of the Seal-fishery," and its preamble runs thus, "Whereas it is expedient to make certain regulations touching the prosecution of the seal-fishery." This can only mean, of course, the prosecution of the seal-fishery from Newfoundland. The first section provides that "No steamer shall leave port before," etc.; the second section, "No sailing vessel shall leave port before, etc.; the third section, "No seals shall be killed by the crew of any steamer or sailing vessel prosecuting the said fishery before," etc., and so on. This act was amended in 1879 in all these particulars.

In the session of 1887 was passed the present act "to regulate the taking of and right of property in seals"; its first section provides against the indiscriminate destruction of seals by their being left bulked on pans without being in the actual charge of the claimants; and the second section is that which

has become the substitute for the section of the act of 1879, under which it is sought to sustain the present prosecution.

The section of the act of 1887 runs thus: "No seals shall be killed by any crew of any steamer, or by any member thereof, before the 12th day of March or after the 20th day of April, nor seals so killed be brought into any port in this colony or its dependencies in any year, under a penalty of four dollars for every seal so killed, to be recovered from the master and crew by and paid to any informer who shall sue for the same in a summary manner before a stipendiary magistrate."

While by this section the time for the commencement of seal killing remains as before, there is a limit fixed to the final killing of seals for the season, which is a new provision; a new and additional offence is created, viz., the bringing into port of seals killed contrary to this enactment; the liability of the ship-owner, which before existed, is omitted; and the recovery of penalties is to be from "the master and crew," and not as in the former act, and that under which the defendant is prosecuted, from the "master or crew," nor as in the first act (1875), from the owner and master respectively.

This act was passed at a time (May the 18th) when the seal-fishery of 1887 had just closed, and besides the changes in the law to which I have referred amongst other things, it limits the time at which vessels shall leave upon second and subsequent trips to the seal-fishery. The limitation for prosecutions under this act is three months, instead of twelve as in the older act.

It is, in my opinion, idle to contend that such acts and such provisions as these, were intended only to regulate the movements of ships and the doings of men within three miles of the shore. They are intended as they are expressed, for the regulation of the prosecution of the seal-fishery, of which the base of the operations is in Newfoundland, and their effect is to control the mode of such prosecution by ships using our ports for entry and clearance, for discharge and shipment, by the masters and crews of such ships, and by the owners possessed of establishments and factories here for carrying on the business which consists in the capture of seals, the making of seal-oil, and the saving of seal-skins.

The natural facts are such that to hold otherwise would be to render practically null the whole supposed law. Nearly all the seals brought in by ships engaged in the seal-fishery are killed many miles from the coast, and often scores of miles distant from the ports of clearance.

The preservation of the seal, the prevention of its wasteful destruction, the protection of one of the principal industries of the colony, is the object of these enactments, which are unlimited in their operation so far as distance from the shore is concerned, and are intended to bind all persons engaged in them, and to render such persons amenable to the law of this colony wherever they are within its reach.

If this were otherwise, the prohibition of wasteful destruction from killing and bulking unguarded seals and the limitations of time, and in a word, the entire enactments, would amount to nothing but idle words.

Acts done upon the ice or on the sea, or in the boats of a ship by persons engaged in the prosecution of her adventure, are constructively acts done on board the ship, and the former are as much under the regulation and control of the legislature as the latter. It would be absurd to hold that acts relating, for instance, to the Greenland whale-fishery, or the fisheries of the North Sea, would be operative only upon persons for acts done within the fabric of the ship itself, or within three miles of the English coast.

Something has by way of argument been endeavoured to be made on both sides out of the fact that the sixth section of the act of 1887, with regard to trips, subsequent to the first seal-fishing voyage, entered upon by ships clearing for Davis' Straits and Greenland fisheries, uses the expression "engage in killing seals on the coast of this island."

It may require to be understood that this section applies to such ships as those from Dundee, which, after the close of the Newfoundland seal-fishery, clear from here for the whale and summer seal-fishery, and thence proceed direct to Great Britain; and the object is to prevent them on the occasion of this voyage from taking on our coasts seals which were to be conveyed elsewhere, and therefore the legislature cautiously makes use of restrictive language in this section, which is absent in all the rest; a fact powerful to demonstrate were it not otherwise abundantly clear that the other provisions of the act are intended to apply broadly.

I take it to be a sound doctrine as a general proposition that the limits of colonial jurisdiction extend to only three miles from the shore, and that a colonial legislature cannot confer a jurisdiction beyond its territorial limits, but here the exercise of the jurisdiction is upon persons and things within the limits, although it may be for acts done in violation of our law outside those limits.

In the case of the *Falkland Islands*, the opinion of the Queen's advocate (A. D. 1854), who reported that Her Majesty's government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league) from the coasts of those islands, was carried to the fullest extent; but the bearing of that opinion was upon a case differing in its essentials from this one, and referred to foreign intruders coming from abroad on to the coasts of those islands.

If the case now before us were one of a foreign cruiser at sea prosecuting the business from a foreign port, and taking seals outside the colonial limits, there could be no doubt that the act would have no application.

We have here to guard against confounding the territorial limits of the government with the power of legislation over persons and things, between which there is no necessary coincidence, except as to the place of putting the law in execution against persons who owe subjection to it.

To uphold the decision of the magistrate would be to say that the legislature of Newfoundland is powerless to impose upon persons engaged in the prosecution of its fisheries any rules for their personal government or for the conduct and regulation of their occupations outside three miles of the shores of Newfoundland; in other words, to place such persons outside the pale of all law.

In my judgment, the facts of the present case amply sustain the subjection of the defendant to our municipal laws, and that the plaintiff is, on this appeal, entitled to judgment, the extent to which the defendant may be shewn to have made himself liable.

There is, however, another point upon which my brother judges, upon a former application, overruled the objection of the defendant, and it does not enter into the present appeal as between this court and the court below, but if this case were to go to the judicial committee, it might not be possible for the court of final appeal to overlook the objection, if it be well founded. I refer to the position taken by the defendant, that when the act of 1887 was passed, the former provisions of the statutes relating to the particular now in question as to the prosecution of the seal fishery, was repealed; that that act had ceased to be law when these proceedings were taken; that a new code was introduced, and that it was not intended, nor was it competent after that time to institute a prosecution for any violation of former enactments in regard to acts for which

new provisions had been established and by which new rights and remedies had been substituted.

Twelve months was the limit within which to commence a prosecution under the old acts—three months under that of 1887. In the act of 1879 the master's liability was several; under that of 1887 it is made a joint liability with the crew.

I have already pointed out several of the other marked differences between the latter statute and the act of 1879, under which the defendant is now sued. The present prosecution was not commenced until after the act of 1887 had passed and nearly a year had elapsed from the alleged commission of the offence.

It is contended for the defendant that the act of 1887, so far as it made other provisions for the regulation of the seal fishery, repealed those for which it was a substitute; and that it it could not have been in the contemplation of the legislature to leave masters and crews of the spring of 1887, whose avocations had already ceased, open to prosecution for nearly twelve months more for acts already committed, while it introduced a limitation of three months for the prosecution of offences under the new law.

I think there was much force in the objection. The changes in the enactments and in this particular section were so material that I am of opinion the weight of English authority is that the latter section would have repealed the former.

"Affirmative statutes introductive of a new law imply a negative."—*1, Shower, 520*. In *ex parte Carruthers, 9 E., 44*, it appeared that 13 Geo. 2, cap. 28, sec. 5, exempted from impress any harpooner or seaman in the Greenland trade; but 20 Geo. 3, cap. 41, sec. 17, added, *whose name shall be inserted in a list*, and it was held that the former statute was in this respect by reason of the special provision, defeated by implication.

In *Rex vs. McKenzie, R. & R., 429*, the judges held that an offence committed before the passing of a new Act repealing a former Act could not be tried under either, and the prisoner must receive judgment as for a common law offence. In *Miller's case, 1 W. Bl., 450*, it was held by the court that no proceedings can be pursued under a repealed Act of parliament though begun before the repeal, except by special exception. In this case, if there be a repeal, the proceedings were taken nearly a year after it.

In *Mitchell vs. Brown, 28, L. J.*, Lord Campbell held that "if a later statute again describes an offence created by a former

statute, and affixes a different punishment to it, varying the procedure, &c., the latter enactment operates by way of substitution and not cumulatively." "Sections as to the recovery of penalties, the mode of convicting, the appeal and the limitations of actions are all material to show that the proceeding for such an offence should be under this statute"; and his lordship adds in language singularly applicable upon this point to this case: "When such specimens of legislation come before us we are driven to form the best conjecture we can as to the intention of the legislature. Luckily no inconvenience can happen in future from their determination."

True it is that in *Ex parte Todd*, 19 Q. B. D., 194, the master of the rolls, Lord Esher, said: "In determining whether any provision of an Act was intended to be retrospective or not I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals the former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act, should entirely escape the consequences of their wrong-doing by reason of the repeal of the old Act."

The doctrine so laid down seems to be eminently satisfactory when applied to a strict re-enactment of certain sections of a former Act in a statute containing new independent provisions on the same general subject-matter; but, when the dictum is by Lord Esher carried further, when he says: "I think it is a wholesome doctrine to hold that a section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new." I prefer the position upheld by Fry, J., in the same case, when he remarks: "To say that a section of an Act is in part retrospective and in part not, strikes me as a somewhat novel mode of interpretation. I see no indication of an intention of the legislature to exclude the ordinary rule that a statute is not retrospective." In this case there is in fact no repetition or re-enactment of an entire part of a former section, as the personal liability has been altered although the time is identical. If the Act of 1879 has not been repealed it must be cumulative with that of 1887, a position so inconsistent as not to be tenable for a moment, and which has not, indeed, been set up at the bar.

If then section two of the Sealing Regulation Act of 1887 is not retrospective it cannot cover the breach of the law with

which the defendant is charged, and if, as to steamers, it repeals section four of the Act of 1879, there was not, at the time of the plaintiff's commencing his proceedings in this action, any enactment in force applicable to the charge; unless, as is contended, the plaintiff is aided by chapter one of the con. statutes of this colony, section one, which somewhat confusedly enacts: "Where an Act shall be repealed in whole or part and other provisions substituted, all proceedings taken under the old law shall be taken up and continued under the new, when not inconsistent therewith, and all penalties may be recovered and proceedings had in relation to matters which have happened before the repeal, in the same manner as if the law were still in force."

The plaintiff's contention is that this section of cap. one of the consolidated statutes must be read as containing distinct provisions; that the language used in its latter part enables proceedings for the recovery of penalties to be commenced under an Act notwithstanding its previous repeal by the legislature; while the defendant takes the position not only that the prosecution is "inconsistent" with the new law, but that the whole section must be read together, and that this latter part is not a substantive enactment but relates to the penalties and proceedings for their recovery, for which a prosecution may have been already commenced before the repeal; that it was not intended by prospective legislation of this kind to keep alive a repealed enactment to any larger extent, and that this more reasonable construction is fortified by the fact that the former part of the section provides for even the continuation of an already commenced prosecution only "when not inconsistent" with the new Act, while no such qualification, if the latter part of the section were to be read substantively, and although such qualification would be *a fortiori* applicable to the latter, attends the initiating of proceedings under the old Act after the passing of the new.

I am thus explanatory upon this point, as if it presented itself upon appeal from this court; as a radical objection to the sustainment of these proceedings it may be expected that this court should be explicit upon a point which has to be elucidated by reference to a local enactment as well as to English precedent.

N. B.—Referring to observations of the bench as to the fact of the defendant's ship being registered in Dundee and not in Newfoundland, Mr. Justice Pinsent added that in his opinion no point could be made of

that fact. It was immaterial in what port a British vessel might be registered, she would be a British ship everywhere and entitled to the same privileges and subject to the same obligations. Most or many of the ships owned or engaged in the commerce of this colony were registered in Great Britain. The point was, in what business were they employed, and to what laws were they for the time being subject?

HON. MR. JUSTICE LITTLE:

These proceedings come before this court on an appeal from the judgment of James G. Conroy, esquire, presiding as stipendiary magistrate, in the trial of a cause between these parties under the provisions of the local act, the 42nd Vic, cap. 1, entitled "An act respecting the prosecution of the seal fishery."

From the record it appears that a summons was issued by the magistrate on the 27th day of February last against the defendant, master of the steamer *Terra Nova*, requiring him to appear and plead, on a day therein named, to an action at the suit of the plaintiff, who sued "as well for the receiver general of Newfoundland, for the use of public hospitals, as for himself in that behalf, &c., who claims from defendant the sum of \$20,000 for the matters contained in the particulars annexed."

These particulars were duly set out in a formal statement or plaint of the cause of action.

The defendant, by counsel, appeared, and by plea contended "that the statute 42nd Vic, cap. 1, under which the proceedings were had, and which permitted such proceedings to be taken within twelve months from the commission of the offence, was, so far as concerned the time in which proceedings must be taken, repealed by implication by statute 50th Vic, cap. 23, secs. 2 and 7," and on these grounds the magistrate gave judgment in favor of the defendant, as appears from the following indorsement on the summons: "Complaint dismissed on the grounds set forth in defendant's contention."

An appeal was thereupon had, at the instance of the plaintiff, to this court, upon the judgment so rendered, and after hearing the argument thereon of the counsel for the parties, it was held by a majority of the judges of court, that the posterior act did not operate as a repeal of the prior act to the extent and in the manner contended for by the defendant's counsel; the matter was consequently remitted to the court below with directions to hear and determine the same in pursuance of the provisions of the 42nd Vic, cap. 1, under which it appeared the

information had been laid and the alleged penalties to have been incurred. Although that appeal was a substantive proceeding, and was then finally determined, still as both the parties have in turn attempted to avail in argument of the terms of both acts and the position previously contended for, it may be right hereafter more lengthily to refer to the grounds which warranted the judgment arrived at.

The further hearing of the complaint appears to have been proceeded with, and a judgment was rendered therein by the magistrate in favor of the defendant, and is set out on the record as follows:

In this action, referred back to me by their lordships of the supreme court, I have taken evidence by which it has been shewn to me that the seals, the subject of the complaint, were killed beyond the limits of the territorial jurisdiction, and I have again to dismiss the complaint upon that ground.

(Signed), J. G. CONNOY, J. P.

From the evidence as taken in the court below and the facts admitted by counsel for the respective parties before this court on the argument, it would appear that the *Terra Nova*, the steamer referred to, was registered at the port of Dundee, in Scotland, where a number of the crew had been shipped, as on former occasions, for the prosecution of the seal and whale fishery, and were on board her in the prosecution of the seal fishery at the time of the commission of the acts complained of; that said steamer cleared from Dundee in that spring (1886) for St. John's in the prosecution of her voyage; that the greater portion of her sealing crew were subsequently engaged here and supplied by parties resident here, and sailed in said steamer on the voyage in question; that she returned to this port from the seal fishery and discharged her cargo, the proceeds of that sealing voyage, the owners of the steamer having premises in St. John's and all appliances for the manufacture of seal oil from seals so brought in by the *Terra Nova* and others of their sealing fleet; that after discharging the seals the said steamer again cleared from the Customs at this port and proceeded on a sealing and whaling voyage, which is prosecuted by her during the summer months in latitudes further north, and finally returns to Dundee with the proceeds of such voyage. That seals were taken by the crew of said steamer during the spring in question, as alleged, on the 11th day of March, about fifteen miles to the eastward and southward of Cape Bonavista.

In the course of the argument on appeal, although many

authorities were cited bearing on the question of the jurisdiction and power of magistrates and of our tribunals to adjudicate in suits for the recovery of penalties incurred under our statutes, irrespective of the locality or the position of the place where the breach might have occurred, still no reported case was cited, or probably could be found, in point and directly bearing court on the substantial question on which the judgment in the below was rendered.

The statute under which these proceedings were initiated and prosecuted, was passed by our legislature on the 22nd of February, 1879, and as already stated is entitled "An Act respecting the prosecution of the seal-fishery." The fourth section provides, "That no seals shall be killed by the crew of any steamer or sailing vessel before the 12th day of March in any year, under a penalty of four dollars for every seal so killed, to be recovered from the owner or other person as aforesaid, or from the master or crew of the said vessel, or from the parties receiving the same respectively." * * *

The contention in support of the position assumed by the plaintiff appellant is, that by force of the terms of this section, the crew of any steamship cleared from our customs department for a sealing voyage, render themselves amenable to the penal provisions of that act, by killing seals anywhere on the high seas before the 12th day of March. In effect, that our legislature has full power to enact laws to govern such crews in the prosecution of this industry wherever the operations may be prosecuted, *whether within or without* the territorial limits of the colony.

And in support of this theory, certain well recognized rules and principles of international law were cited from Wheaton, Phillimore, Vattel, and other public jurists. This doctrine embodies the principle that both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong.

That the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights it enjoys, and that the vessels of a nation on the high seas are to be considered as portion of its territory; consequently, applying these rules to the admitted facts, there being an open infringement of the terms of the section given, the objection of the want of territorial jurisdiction is completely set at rest, and the liability of the defendant placed beyond question.

These are the grounds and the purport of the main contentions of the appellant.

Notwithstanding the admittedly strong position in the case of the appellant thus presented, it is found there are stronger grounds and reasons constraining one to uphold the judgment delivered below.

The principles of international law, referred to by counsel, cannot be challenged, but may be qualified, and in their application to the circumstances presented here, and will be found hardly sufficient to warrant the reversal of the judgment on this appeal. In some of the authorities in which these principles are laid down, it is observed that though there can be no doubt about the jurisdiction of a *nation or state* over the persons composing the crews of its fleet when out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all. The maritime territory of every state merely extends to the distance of a marine league from the shore of the state, and this rule has been enforced by our own tribunals, as appears in the able judgment of the late learned chief justice of this court, in the case of the *Anglo-American Telegraph Company vs. The Direct United States Cable Company*, hereafter referred to.

The reason for the extension and continuity of this jurisdiction to ships, so situated, would appear to be for the preservation of order and discipline on board of the nation's ships, for the detection and punishment of crimes there committed, the enforcement and regulation of right of the parties *inter se*, and for the protection of the lives and property of the subjects engaged in the trade and commerce of the state.

This being the position held towards national ships, it becomes necessary to determine how far they govern in their application under our laws to the present case.

The charter or royal letters patent issued in 1832 creating a legislature in this colony, the commission and royal instructions to Sir Thomas Cochrane, the then Governor, and the despatch from the Colonial department in July of that year, define and declare the territorial limits of the colony, and that the legislature is empowered to enact laws regulating the *internal affairs* of the colony, subject to the Queen's power of dissent and the supreme control of the Imperial parliament.

This law-making power conferred on the legislature gave to

the laws and ordinances that might be enacted full effect over the island and its dependencies, and over that territory which forms part of it from its settlement.

In the words of the judgment quoted, the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to headland of the bays,—*Wheaton*, 320 ; *Keut's Commentaries*, 1 vol., p. 26, &c., &c. ; and this grant of legislation, while it enlarged the powers, neither added to nor lessened the territorial jurisdiction of the local government. And, it may be observed, that before the grant of this constitution, the Supreme Court of this colony had jurisdiction in all cases of *crimes* and *misdemeanors* committed on the banks of Newfoundland or any of the seas or islands to which our ships or vessels repaired.

We have now merely to see by what means and on what grounds the defendant, as master of this steamship, the *Terra Nova*, can be held liable for an infringement of our laws under the circumstances stated by him in his evidence. And it may here be in place to observe that no evidence beyond his own appears to have been offered in support of the complaint against him.

The *Terra Nova* is owned and registered in Scotland. She periodically calls at this port for the purposes already stated, in the course of the prosecution of her sealing and whaling voyages : after the completion of her summer sealing and whaling voyages her final port of discharge is Dundee in Scotland. On the occasion of the alleged breach of the provisions of our statute, her crew took the seals some fifteen miles off a cape or point on our eastern coast.

Aside then from any question of domicile or local ownership of the vessel, as raised on the argument if an offence of a serious character against the criminal laws had been committed on board, at the place where the seals are said to have been taken, it goes without saying that the offenders would be amenable solely to the provisions of Imperial acts, and our courts would only have jurisdiction over such case under and by force of these acts.

This jurisdiction has been expressly conferred in such cases by various Imperial acts, such as the 12th and 13th Vic., 18th and 19th Vic., 36th and 37th and 39th and 40th Vic., cap. 86, in order that offences committed on the high seas, on board of British ships, might be reached and brought within the pale of the law,

Such enactments embody the principle of that well-recognised proposition of international law, now more settled and indisputable than any other, that the ships of each nation on the high seas carry the law of their *own nation* with them, and that those on board of them are amenable in respect of offences committed in them to the law of such nation alone.

This sovereign authority rendering the subject amenable under such circumstances to Imperial laws is inherent in the state or nation; and, as a colony is only a part of the state which created it, (*Levi on International Law*), it is obvious it cannot exercise these powers which pertain alone to the nation or state creating it. Reference has been made to the well-known principles established by usage and the common consent of nations, which constitute international law, and by which a three-mile zone or belt of waters surrounding our shores is subject to the territorial jurisdiction of the sovereign. And, to repeat the ruling of the late chief justice in the judgment cited above, "this authority existed with the local government prior to the grant of representative institutions in the colony; that such grant, while it enlarged the powers, neither *added* to nor lessened the territorial jurisdiction of the local government, and that, subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have effect and operation to the full extent of that territorial jurisdiction."

This delegated power of legislation has been repeatedly acted on, and the force and operation of the Acts of the Colonial legislature within that sphere have been recognized and their authority placed beyond dispute.

Can the government of the colony assume the power of extending the limits of that domain, and by virtue of an Act of its legislature exercise control and jurisdiction on the high seas under the circumstances set out on this record?

It cannot be questioned that the offence created by the statute in question is of a criminal nature, an offence unknown to the penal laws of the realm, and subjecting offenders to heavy penalties.

The accused party or defendant, being the captain of a British ship, owned and registered in Scotland, and having cleared from a colonial port in the manner and under the circumstances stated, whilst prosecuting his voyage and on the high seas beyond the dominion and territorial waters of the colony, his crew hunted these seals, or animals *feræ naturæ*, on the fields

of ice away from the ship, and for having killed at that time and placed on board numbers of these animals which may never have been on the shores of the colony or within the three-mile limit thereof, the defendant is said to have continued within the pale of the municipal laws of the colony, and subjected himself to the penalties of the statute under which these proceedings are had.

Viewing the limitations and restrictions constitutionally surrounding our governmental and legislative rights and powers, and the extent of our territorial property and sovereignty, are there grounds sufficient to justify and warrant the application of the provisions of the Act of the legislature in the manner sought for in these proceedings?

Statutes, it is said, are to be so construed as to apply only to those persons and places which are within the dominion of the legislative power,—*Max., p. 123.*

What then should be the perview of the acts of the legislature of the colony? Certainly not so far-reaching or of so national or imperial a character as that contended for.

Undoubtedly then the authority conferring such extra territorial jurisdiction should be of the most unequivocal character more particularly when local legislation is intended to be so far-reaching and penal in its operations.

And taking the statute and marking the absence from it of any express language showing an intention on the part of the legislature that its provisions might operate beyond the territorial limits of the colony, it would be unwarrantable and against all rule to impose such a construction, extending its operations to meet the exigencies of a case such as the present.

The act is penal in its nature and character, and therefore must be strictly construed, and cannot be regarded as possessing these elastic qualities enabling it to reach one who may, at Davis Straits or elsewhere, on a sealing voyage far beyond our waters, have infringed its provisions.

It is evident the legislature was fully aware of the insufficiency of the act, as it then stood, to meet such a case as this, and also of the inability at present of extending its powers beyond the fixed territorial limits. Consequently it properly adopted a course of legislation regarded as wholly sufficient to meet the circumstances, and to fully protect the interests involved.

An act was passed, entitled "An Act to regulate the taking of and right of property in Seals." The second section thereof

provides that "No seals shall be killed by any crew of any steamer before the 12th day of March, or after the 20th day of April, *nor shall seals so killed be brought into any port in this colony*, in any year, under a penalty of four dollars for every seal so killed," &c. This remedy, so far as legislation can affect or control such operations, should be found effectual in preventing a repetition of the acts complained of. For, regardless as to whether it may have been within or without the territorial limits, or under what circumstances the seals were taken or killed, if the killing or taking occurred before the day so named, the party *bringing such seals* into any port in the colony will be liable to be proceeded against and made amenable to the provisions of the act. Under this enactment and prohibition a recurrence of proceedings in our courts of a like character to these now being adjudicated on, need not be anticipated.

In determining on the questions raised on this appeal, consideration is alone given to the fact set out and admitted on the record, irrespective of the parties, their position or circumstances, and such a decision is arrived at as, in my judgment, is warranted under the law as applied to these facts. Recognizing then the absolute character of the accepted rules and principles of law, to which reference has been made, the subordinate position of the dominion and powers of the legislature and the limited extent of our territorial jurisdiction, particularly in relation to the ship of the defendant under the circumstances, I cannot find the case permits of any other determination than that arrived at in the judgment so appealed from.

It may now be proper to make reference to the proceedings and judgment in the court below, which formed the subject of the first appeal in this case. It appeared from the defence then set up, that defendant claimed that plaintiff's right to sue him was barred by reason of the repeal of the act 42nd Vict., cap. 1 (under which he sued) by the act 50th Vict, cap. 23, and when the proceedings were instituted plaintiff could not proceed for the recovery of any penalties incurred for acts done in violation of former enactments now repealed, and for which new provisions had been enacted in the latter statute, &c. This defence and contention being sustained, and judgment given in favor of the defendant, the appeal was had by the plaintiff, and the judgment thereon resulted in favor of the appellant, and the case was remitted to the court below to be proceeded with under the provisions of the earlier statute.

On reference to these two statutes it will be found by the

provisions of the first-named Act, that of 1879, that steamers are restricted from sailing from any port for the seal fishery before the 10th day of March in any year; that sailing vessels shall not sail on such voyage before the 1st day of March; that no seals shall be killed by the crews of any steamers or *sailing vessels* before the 12th March, &c., under a penalty, &c., to be recovered from the owner or other person, &c., or from the master or crew, &c.; that no immature seals (known as cats) shall be killed by the crew of any steamer or *sailing vessel*, &c.; that no action shall be brought for any penalty under the act after twelve months from the time such penalty shall be incurred; and provides for a right of appeal by any party who shall feel himself aggrieved by any judgment of a magistrate had under the act.

The later act, viz., that of 1887, embodies new legislation on the right of property in seals that may be killed by the crews of *steamers*, and defines what acts shall be necessary to *continue* that right, &c. It proceeds to provide that no seals shall be killed by the crews of *any* steamer before the 12th March or after the 20th day of April, nor shall seals so killed *be brought into any port in this colony or its dependencies*, in any year, under a penalty, &c., to be recovered from the master and crew, &c. It prohibits the sailing of steamers on a second or subsequent trip, &c., after the first day of April in any year, &c.; and provides that *vessels* shall be deemed to be on a second trip if they shall be engaged in killing seals *on the coast of this island and its dependencies* after clearing and sailing for Davis Straits or Greenland fishery, &c.; and finally directs that any complaint under the provisions of the act must be brought within three months of the return of any such vessel from said second trip, or, in other cases under this act, within three months of the alleged breach, &c.

It is unnecessary in this stage of the proceedings to enter into an analysis of these respective enactments in order to show that the latter statute cannot be regarded as operating as a repeal, either expressly or impliedly, of the *entire* provisions of the earlier act. If it were so there would appear to be no restriction at present on the sailing of steamers or sailing vessels on the first trip or voyage, and, in fact, the latter act is silent altogether on the operations of sailing vessels. But, aside from these striking differences between the provisions of the two acts, we have only to deal with the contention of the defendant that it was not only a repeal of the first act,

but operated retrospectively and relieved any party who may have infringed the provisions of the first of any liability if he had not been proceeded against within the three months as provided for by the latter statute.

The result of such a contention is apparent, and would give immunity to parties for offences committed against the express terms of a statute if not proceeded against before a repealing or amending statute came into operation. The court could not, under the circumstances and data presented in this instance, support such a construction.

If we had not a local statutable remedy to apply to such cases, we might have reference to a number of our English reported cases establishing rules which might be applied in the solution of any such difficulty. We find it laid down, for instance, in the case of *Moon vs. Durden*, 2 *Ex. 22*, that a statute is not to have a retrospective operation unless the intention is clear and expressed; and "that no statute is to have a retrospect beyond the time of its commencement. In some cases the legislature has thought it just to make enactments retrospective, even at some sacrifice of general principle, but then it does so in express terms. *Wright vs. Hale*, 6 *H. & N.*, Channel B., *inter alia* stated, we ought not to regard acts of parliament as having a retrospective operation, unless it appears clearly that such was the intention of the legislature."

It is certainly clear there are no express words here justifying any such retrospective application in the posterior act, much less is there room to infer that it was the intention of the legislature that "persons who before the passing of the new act, had broken the provisions of the old, should entirely escape the consequences of their wrong doing by reason of the repeal of the old act." Again, it is observed by *Cockburn C.J.*, 10 *L. R.*, C. 198: that when statutes are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it, and is not necessarily retrospective.

The language of the clauses of the act of 1887 is unambiguous, and its limiting sections point to any prospective infringement of its provisions, and no reference is even made to the Act of 1879. There are other references by way of authority that might be cited in support of the decision of the majority of the court, aside from the provision made by the seventh section of chap. 1 of our consolidated statutes to prevent any such lapse occurring in the execution of our laws and the adminis-

tration of justice, as would arise if the objection of the defendant were well founded.

The section provides that where an act shall be repealed in whole or in part, and other provisions substituted, all proceedings taken under the old law shall be taken up and continued under the new when not inconsistent therewith, and all *penalties may be recovered* and proceedings *had* in relation to matters which have happened before the repeal, in the same manner as if the law was still in force.

Now *these proceedings* were instituted for the recovery of penalties in relation to matters which happened before the repeal, and the objection taken in bar of the right of the plaintiff in that particular, was, in my judgment, properly set aside.

Sir W. V. White way, Q. C., and *Mr. Johnson* for complainant.

A. J. W. McNeily, Q. C., for defendant.

PARSONS v. BOARD OF WORKS.

1888, *September*. CARTER, C. J. ; PINSENT, J.

Public building—Duty to repair—Liability for injury arising out of defective ceiling—Legislative grant for repairs—Executive responsibility.

A legal practitioner, in the exercise of his profession, was at the Police Court when part of the ceiling fell on him, whereby he sustained injuries. The Board of Works, who take their powers under an act and are appointed by the general government, and whose acts are all subject to the confirmation of the latter, had the management of the building, set up as a defence in an action for damages that they were not liable: (1) In that they were not an ordinary proprietor; (2) That they were a ministerial body with no funds; (3) That the legislative vote had been exhausted, and that the case was not one of misfeasance or nonfeasance. The jury found for the plaintiff. The Board obtained a rule to have verdict entered for them.

Held—That there is no provision in the colony to prosecute the government for tort; that such an action as the present would not lie; when a transfer of power is made no new liability is created. The Board of Works is merely a department of the government, and is not responsible for the neglect or conduct of servants who are the servants of the public, and not of those who had merely the superintendence of the work.

I CONCUR generally with the reasons of Justice Pinsent in the judgment he has just delivered, and the conclusion at which he has arrived, and had done so before I became aware of his

opinion as now expressed, after a very careful investigation of all the authorities I could find bearing on the subject. It would be impracticable to attempt to reconcile the various dicta of the courts upon the liability of public bodies in questions of asserted negligence, and as observed by a learned judge in the *Mersey Dock Trustees v. Gibb*, *H. L. cas.*, 124, "they are very contradictory, and many very unsatisfactory." Apart from the nature of the act complained of, the constitution of the public body has first to be enquired into. The principles applicable to such, if servants of the government, or an independent body, are quite distinct. Now, what is the constitution of the Board of Works, sued in this action, for the negligence complained of. By cap. 59, con stat., 1872, it is to be composed of a chairman and other members, who are to be appointed, as occasion may require, by the Governor in Council, to hold office during pleasure, and to have the *superintendence and management* of certain public buildings, light-houses, &c., and certain roads and streets. All officers and servants are to be appointed and removed by the Governor in Council, who also settle the salary or compensation for each; and all salaries of the whole staff are payable out of the public funds as with other civil servants of the government; and so much is the board under the control of the government, it is declared by the act that none of its proceedings shall be of any force or effect until confirmed by the Governor in Council. It has not a fraction of money at its disposal, except when appropriated by the legislature or executive, and no authority to make a levy or toll. All the buildings and property remain vested in the Crown. The inmates or occupants of the dwelling part of the court house in St. John's, in which the accident in this case happened, from the falling of a ceiling, do so by authority of the government, and the several public offices, in one of which the ceiling fell which injured the plaintiff, were and are appropriated by the same authority for the uses of certain officials. The act does not expressly enjoin any duty whatever on the board, but merely confers on them "superintendence and management" such as, I presume, the postmaster general would have of the post office. The Board of Works is merely a department of the government, and it appears to me that this case falls within the principles of those cases which have decided that when a person or a corporation is or are acting as public officers on behalf of the government, and have the management of some branch of the public business, they are not responsible for the neglect or the conduct of

servants or subordinates who are the servants of the public, and not of those who have the superintendence of that department. See the observations of Lord Wensleydale in the *Mersey Dock Trustees v. Gibb, Supra*. That case was decided on other grounds against the trustees, but if it had been as clear as is this matter, to my mind at least, it would never have found its way to the House of Lords or any other court of appeal. See the *Mersey Docks v. Cameron, 11 H L., 443*. In the recent case of *Gilbert v. the Corporation of Trinity House, 17 Q.B.D., 795*, which was an action for damages for injury to a ship and cargo by reason of the negligence of the defendants or their servants from leaving part of an old beacon, *the property of and rested in the defendants*, with which the ship came in contact, it was contended the defendants were servants of the Crown, and therefore not liable; but it was otherwise held, as they were in no sense an emanation of the Crown, their duties were defined, the beacons were vested in them, and they were responsible for their safe and due maintenance; but that is altogether different from the position of the Board of Works in the present case as before explained. The cases, I believe, will be found to warrant me in saying that whether a party has funds or not, if a duty is imposed which he undertakes to perform and does so in a negligent manner by which damages is occasioned, he is responsible. The jury negatived the question of defect in the construction of the ceiling, and attributed the cause of its falling to something else, for which I do not consider the Board of Works are responsible. I do not positively decide there may not be cases in which the board would not be exempt from an action for the recovery of damages from negligence, but in this matter, so far as appears by the pleadings and evidence. I am of opinion the verdict cannot be sustained. I sympathise with the plaintiff, who has suffered a personal injury without any fault of his. Notwithstanding the boasted legal maxim that "there can be no wrong without a remedy," there will be found, besides the present one, several cases in some of which were admittedly grievous wrongs, and yet the law gave no remedy. Some means should be devised by the legislature to provide a remedy in such cases.

HON. MR. JUSTICE PINSENT:

In this action the plaintiff sued the defendants, by their chairman, for "that in the management and superintendence

of the court house in St. John's it became the duty of the board of works to keep the said court house in a safe and habitable condition and state of repair"; that the defendant board negligently superintended and managed the said court house, and suffered the ceiling of a certain room therein to become loose, unsafe and dangerous, and liable to fall, and although often notified and warned of its condition, did nothing to repair and remedy the defects; that the ceiling fell with great violence upon the plaintiff and seriously injured him, &c.

The plaintiff is a legal practitioner, and his business constantly calls him to the police office—the apartment in which the accident occurred. He was there attending to his professional duties on the 30th November last, when part of the ceiling (the centre piece) fell and struck the plaintiff on the foot, causing severe pain and lameness for some weeks, but not any prolonged incapacity for business.

The plaintiff's case then is, that the board having the management and superintendence of this building, owes a duty in taking care of it, for breach of which they would, in case of injury to persons invited to visit it for purposes of business and whose avocations compelled them to resort there, be liable to respond in damages.

The plaintiff says the ceiling had been for a long time affected by water coming from above; that the condition of the place was notorious. So say others, his witnesses.

There is an inspector of public buildings appointed by the government, and serving the board of works.

This inspector admits in his evidence that he was aware of the condition of the pipes (which appears to have caused the defect in the ceiling) prior to the accident to the plaintiff; that officials had drawn his attention to discoloration in the ceiling from the escape of urinal water; that some time during the season he had made himself aware of the state of the pipes and urinals, and apprehended no danger. The secretary of the board of works proved that there was an annual vote of the legislature for repairs of the St. John's court house and penitentiary in one; that the vote of 1887 had been exhausted, but that the board could, by applying for it, have obtained any amount for needful repairs upon "executive responsibility." The chairman of the board of works proved that he and the board had no knowledge themselves of the condition of the ceiling; that the inspector had not reported anything wrong with it.

The jury found a small verdict (\$20) for the plaintiff.

The defendants have obtained a *rule nisi* for a turning the verdict into one for the defendants, or for a new trial, upon the ground that there is no liability in law on the part of the board in such a case as this.

I sent several questions to the jury to find specially, in view of this objection. I am quite satisfied with their findings in fact. They found that the ceiling was in a dangerous state from a latent defect unknown to the board of works, but which by the observance of due care and inspection should have come to the knowledge of the board, and which was capable of being repaired before the accident happened; that the cause of the defect was the overflow of water; that the board had no funds available from any grant of the legislature, but that the necessary funds could have been provided under "executive responsibility."

I should say that, in the case of an ordinary proprietor, whether an individual or a corporation, the plaintiff had made good his claim. I would go further, and but for reasons which I consider distinguish this case from *Gilbert vs. The Corporation of the Trinity House, L. R. 17, Q. B. D., 795*, I would here adopt the language of Day, J., who said: "The law is plain that whoever undertakes the performance of, or is bound to perform duties, whether they are duties imposed by reason of the possession of property or by the assumption of office, or however they may arise, is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own." In that case the defendants, in whom are vested under the Merchant Shipping Acts the superintendence and management of all light-houses and beacons in England, were in their corporate capacity held to be answerable for damages arising from an iron stump sticking up under water and negligently left in the course of removing a beacon.

In the case of the *Queen vs. Williams, L. R., 9 App. cases, 418*, it was held that the executive government of New Zealand, possessing by statute the control and management of a tidal harbor

with authority to remove obstructions and to receive wharfage and tonnage dues in respect of vessels using the staiths and wharves belonging to the government, had imposed upon it by law a duty to take reasonable care that vessels using the staiths and wharves in the ordinary manner might do so without damage to the vessels, and that reasonable care was not shewn when, after notice of damage at a particular spot, no inquiry is made as to its existence and extent and no warning is given.

The case of *Winch vs. The Conservators of the Thames* was decided upon the same principle, and it was said in the judgment that if the dangerous state of the towing path had been latent, so that the defendants, though using reasonable care remained ignorant of it, or if having found it out they had warned the plaintiff of it, they would not have neglected this duty; and the court held that the funds of the corporation (though established for public purposes) were liable to make good the damages sustained by a private person from any breach of duty on their part. The decision in this case follows *Parnaby v. The Lancaster Canal Company*, and the *Mersey Docks' case*, *L. R., 1 Ex. App. Ca. 93*.

In the *Mersey Docks' case* the cause of injury was a bank of mud, and the defendants, by their servants, had the means of knowing that the dock was in an unfit state and were negligently ignorant of it; and it was there observed: "The true rule of construction is that the liability of corporations substituted for individuals should, to the extent of the corporate funds, be co-extensive with that imposed by the general law on owners of similar works."

The case of the *Borough of Bathurst vs. Macpherson*, *4 app. cases, 256*, even more nearly approaches the present case in its circumstances than those cited above.

The municipality was vested with "the care, construction and management" of public roads, &c., and had left in a state of dangerous disrepair a barrel drain, which had originally been properly constructed by them, and, in consequence of the non-repair, plaintiff's horse fell, causing to the plaintiff a compound fracture of the leg.

These are strong cases at first sight in sustainment of the case of the present plaintiff, but, in my judgment, the latter has to be distinguished from the former in several essential particulars.

In the first-named authority, it is to be observed that the Trinity House levies light dues carried to the account of a

mercantile marine fund, out of which expenses incurred in respect of the service of light-houses and beacons are paid, and the treasury is empowered to advance sums out of the consolidated fund of the United Kingdom, and pay the same into the mercantile marine account; and the judge held that the Trinity House was not in the position of a great officer of state, or, for instance, of the board of trade, "which were delegations by the crown of its own authority to particular individuals."

In the *New Zealand* case it appears that the executive government was, for the purposes there in question, a *quasi* corporation not only invested with the proprietorship and having the control of the harbor and works, but entitled to receive wharfage and tonnage dues for the use of the latter, and the suit was brought under the express provisions of the Crown Suits' Act for "a wrong or damage, independent of contract done or suffered in, upon, or in connection with a public work."

In the cases of the *Conservators of the Thames* and the *Mersey Docks*, the state of facts is very similar.

In the *Bathurst* case the council of the borough was empowered to make rates and levy tolls, and had constructed the original work which had become defective and the borough was a corporation having proprietary and independent powers.

The board of works, in the present case, is a body constituted by local statutes (chapter 59, consolidated statutes, and 38th Vict., chap. 15), not a corporation, and is composed of a chairman and four members appointed by the Governor in Council, and holding office during pleasure. It is a ministerial department, possessed in its own right of no funds or assets, and of only a delegated authority. It has the "superintendence and management" of certain public buildings (including court houses) and of light-houses and beacons, and of public roads, streets and bridges; but the public properties are not vested in it. They are the property of the Crown. The Governor in Council makes and establishes general rules for the government of the board, appoints and removes all officers, including inspectors and surveyors. No proceedings of the board are of any force or effect until the same shall have been confirmed by the Governor in Council, and the government may direct proceedings other than those recommended. All actions are to be taken by and against the board in the name of the chairman. The funds available for the purposes of the board are derived from votes of the legislature for specific services, and the advances said to be made at times under "executive responsibility" are only gratu-

itous and voluntary on the part of the government for the time being, and require the subsequent indemnity of the legislature. In this particular instance of the vote for the St. John's court house and penitentiary, the fund appropriated had already been exhausted; moreover, it was of that general character that its application was discretionary, and it may be that there were purposes for which its use was required of a more urgent and necessary character than the repair of the ceiling of the police office.

The circumstances of the present case, moreover, constitute a case neither of misfeasance in the construction of any work undertaken by this board, nor of non-feasance in the care of an artificial work of its own construction, and the inspector is an officer holding his authority directly from the Crown.

The case of *Cadwell vs. Board of Works*, tried and determined in this court, is somewhat in point here.

It has already been held by this court that a suit upon contract against the board must be taken under the "Claims *ex contractu* against the Government" Act, in other words, under petition of right; and there is no provision in this colony, as in New Zealand, for prosecution of the government or its departments in cases of tort.

I think these circumstances involve such differences between the case of the Board of Works and the several authorities before referred to, that an action of the kind now presented for our determination will not lie.

In the *Mersey Docks* case, Lord Wensleydale, distinguishing between such a corporation and government officers and bodies, said, "If the Crown were to make a corporate body for the regulation and government of the post office, neither individuals nor a corporate body would be responsible for the neglect of their servants." And in the case of the *Borough of Bathurst*, the judgment of the Privy Council recognized the authority of those cases in which only a transfer of powers appeared to have taken place, and in which "it was not the intention of the legislature to create by statute a new liability."

It appears to me that the position of the Board of Works is simply one of the transfer of certain powers of the government; the body is an official delegate of the government, through which machinery is provided for the execution of public works of an uncertain character, and, except so far possibly as it may be invested with precedent authority and funds for the execution of a particular work, is not amenable as such

to third persons. If its members undertook a work unprovided with government sanction and public funds it is, in my judgment, doubtful if any action would lie against the board as such, even for acts of trespass or misfeasance. It seems to me to be the corollary of the position I take here that the individuals undertaking thus to act would be so exceeding the legal authority of the board as to render themselves personally responsible for such acts. They could not justify under the authority of the board for acts *ultra vires* of the board, and they could not justify under the government, which could not itself be prosecuted or held legally liable for their proceedings.

Upon the question of liability for non-feasance, the case of *Gibson vs. The Mayor of Preston* is in point, where it was held that an action for personal injuries sustained by one of the public, owing to the non-repair of a highway, does not lie against a local board of health, constituted under the Public Health Act, 1848. By that statute it was enacted that the local board of health, within the limits of its district, should exclusively execute the office of surveyor of highways with all his powers and liabilities. Now, it had been held that although the legislature imposed upon the surveyor the duty of repairing the roads, yet, as this was only as the officer of the parish, and as no action could be brought against the parish, it was not to be supposed that it was the intention of the legislature that such an action could be maintainable against the officer, Wills J., in delivering judgment observing, "This act of parliament appears not to have been passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the existing duty of the parish may be conveniently fulfilled." "At common law," says Hannen J., "no action could be maintained by one of the public in respect of injury sustained by a highway being out of repair; the enactment that the streets shall 'vest' in the local board, whatever meaning may be assigned to that expression, does not seem to us to enlarge the liability resulting from the following words, that they shall be 'under the management and control of the local board.'"—*L. R. 5, Q. B. 218*.

If this principle were to be applied to the Board of Works, it would be rendered liable in any case in which damage may arise from the most trifling disrepair in any road, street or bridge in the colony, although there might be no vote for the service, or that serious defects elsewhere called in the exercise of their discretion for the expenditure of the legislative or exe-

cutive appropriations in places other than that in which the may have happened.

I am, for these reasons, of opinion that the verdict of the jury can not as a matter of law be sustained, but I think the justice of the case will be more fairly met by making the rule absolute for a new trial, rather than in turning the verdict into one for the defendants, in the hope that the case may be allowed to remain there and the plaintiff relieved of payment of defendant's costs in an action in which the facts would, under ordinary circumstances, have entitled him to retain his verdict.

Sir W. V. Whiteway, Q.C., and Mr. Johnson for the plaintiff.

The Attorney General (Mr. Winter, Q.C.) and Mr. McNeily, Q.C., for the defendants.

MARCH, ET AL. v. THORBURN, ET AL.

1888, April. HON. MR. JUSTICE LITTLE.

Contract—Charter Party—Bill of Exchange—Acceptance for freight—Insolvency of drawer.

The plaintiffs under a charter party carried a cargo of fish from St. John's, Newfoundland, to Barladoes for the defendants. The charter party stipulated that freight should be paid on "right and true delivery." The cargo was delivered. The master of the ship took a Bill of Exchange from the consignees, who were the agents of the defendants, on defendants. Before presentation of Bill of Exchange, the drawers, Louis & Sons, failed. The plaintiffs in an action looked to the defendants for the freight. The latter contended that they were not liable, as the plaintiffs had made themselves the creditors of the consignees by taking their Bill of Exchange, instead of cash, as provided by the charter party. That at the time of failure the consignees had funds of defendants on their hands.

Held—Where there is a charter party covenanting for payment of freight on a "right and true delivery" of the cargo at a foreign port, the freighter is not discharged, by the master taking from the freighters agent, a Bill of Exchange, if the bill be not afterwards honored. It is nothing more than an order on defendants. Credit was not given the agent by receipt of that order. Unless the plaintiff by his agent distinctly elected to accept a bill instead of cash, it would not operate as a payment which would relieve defendant from liability.

THIS was an action brought on a charter party, by which the plaintiffs, owners of the ship *Nelly*, let her to freight to the de-

fendants for the carriage of a cargo of codfish from the port of St. John's to Barbadoes and Demerara, "or so near thereunto as she might safely get, and at any safe place in the said ports as ordered, deliver said cargo on being paid a lump sum of \$1000, if only one port used; if the vessel were forwarded to Demerara, with whole or part cargo, then freight in such case to be a lump sum of \$1,100. * * * The freight to be paid on right and true delivery of the cargo" The plaintiffs, in their declaration, fully set out this charter party, and averred that they carried said cargo in said ship to Barbadoes, and there delivered the same to defendants, who there paid a certain amount per disbursements on account of said ship, and plaintiffs claimed \$792.90 as a balance due them on said freight, and also interest thereon amounting to the sum of \$60.

The defendants, by their pleas, after formally denying the making of said deed, alleged that the plaintiffs' claim for freight was satisfied and discharged by payment, and denied any indebtedness on the claim for interest.

The case was tried before me with a special jury, and the evidence adduced on the trial, relied on by the parties in support of the respective positions set out on the record, may now be briefly referred to. It therefore appeared that defendants, with the plaintiffs, on the 8th day of November, 1886, entered into and duly executed a formal charter party, the essential and material part thereof appears in the foregoing abstract, and the usual bills of lading were given for said cargo referred to. The said ship *Nelly*, so laden with her cargo of fish, proceeded on her voyage, and arrived at Barbadoes and duly delivered her cargo to Messrs. Louis and Sons, the consignees and agents of the defendants at Barbadoes; that Louis & Sons advanced to plaintiffs \$207 on account of disbursements for their ship at Barbadoes, and delivered to the captain the following as a bill of exchange, drawn on the charterers for the balance of the freight:—

"BARBADOES, 10th Dec., 1886.

"Messrs. WALTER GRIEVE & Co.,

"St. John's, Newfoundland.

"Please pay to the order of Messrs. Stephen March & Sons the sum of \$792.90, being balance of freight on a cargo of codfish per barquentine *Nelly*, from St. John's, Newfoundland, as per charter party.

"Dated 8th November, 1886.

"(Signed,) LOUIS, SONS & Co.

"\$792.90."

This paper was presented by plaintiffs to defendants in the early part of the month of January, 1887, but declined honoring the same or recognizing any liability thereunder, referring the plaintiffs to the official assignees of Louis & Sons, who, since the drawing of the bill, had failed or suspended payment, and their estate, it appeared, was in the hands of the assignees for liquidation. In the evidence of the captain of the *Nelly*, taken *de bene esse*, nothing whatever is stated as to the receipt by him of this bill, nor does he state anything in relation to the payment of his freight or the monies disbursed at Barbadoes on account of his ship by Louis & Sons, the consignees, whom he regarded as the agents of plaintiffs and defendants.

From the evidence of Nathaniel March, one of the plaintiffs, it appeared that they had entered into several such charters with defendants for similar voyages to the West Indies, and invariably received payment of their freight in St. John's on orders drawn by the consignees on the charterers here; the balances of freight so drawn for would be placed by defendants to the credit of a current account which plaintiffs had with them. On the occasion of negotiating with the broker for this charter, it was stated and understood that the freight in like manner would be so collected here, and that instructions had been given by plaintiffs to the captain of the *Nelly* to that purport. He further deposed that this course of dealing resulted in no additional pecuniary benefit or convenience to the plaintiffs, and that they at no time waived their claim against defendants or look to Louis & Sons as their debtors for the freight.

The defendant, Sir Robert Thorburn, deposed that he was not informed of any variation in the mode of payment as stipulated for under the charter party, nor of any transactions altering the conditions so provided for. The first he heard of the demand for freight was on the presentation of the draft or order by plaintiffs at the time stated in the evidence, and he declined to honor it as Louis & Sons had no funds here in defendants' hands, and were known then to be in difficulties and defendants' firm were creditors of theirs to a considerable amount. He refused payment of the draft and informed the parties they should look to Louis & Sons for the amount, as they had made themselves the creditors of these parties by taking the bill of exchange from them instead of obtaining their freight as provided by the charter party; that Louis & Sons had funds of defendants in their hands to meet the freight, but in accordance with plaintiffs' instructions had given this order without

the privity of defendants. A number of letters, the remittances for the cargo of fish per *Nelly*, were received by the Greenock firm of Walter Grieve & Co., as appeared by letters of the 5th of April, 1887, put in evidence with others of plaintiffs and defendants.

The facts relied on in support of the issues to be passed on were being now ascertained, the respective contentions of the parties as to their obligations under the charter party obviously resolved themselves into questions of law, which should be determined by the court. The jury were, therefore, directed to return a verdict in favor of the plaintiffs for the amount sued for, leave being reserved to the defendants to take a rule embodying the grounds of their contentions, and for setting aside the verdict and having it entered for defendants.

The verdict was then entered for the plaintiffs for \$866.84, and the following *rule nisi* was accordingly granted to defendants:

"That the verdict in this cause be set aside, and a verdict and judgment herein be entered for the defendant, on the ground that the plaintiffs, having instructed the captain of their vessel, the *Nelly*, * * * to require and receive payment of freight in question in this cause, otherwise than as provided for in the charter party, * * * and the said captain having taken from Louis, Sons & Co., of Barbadoes, an order on defendants for the payment here of a sum of money, stated to be the balance due plaintiffs, on account of said freight, after deducting certain disbursements made * * * on account of said vessel, instead of requiring and receiving the payment of said freight or balance thereof on right delivery of cargo, or insisting upon his lien upon the cargo for said freight as provided by the charter party, took that order as payment of said freight, and by so doing discharged the defendants, who had no funds of said Louis, Sons & Co. in hand to meet the said order; or that the said verdict be reduced by striking out of the same the amount allowed for interest on the amount, unless cause to the contrary be shewn," etc.

The argument on this rule was heard by the court on the 4th instant. On behalf of the plaintiffs, Sir W. V. Whiteway (their counsel), in discharge of the rule, as and in support of the verdict, relied on the terms of the charter party, which, as he contended, prescribe and limit the payment of freight in cash at Barbadoes; that the consignees were the absolute agents of defendants, and plaintiffs in no way recognized them in any other character, and took their order as on former occasions on their principals for the balance of freight; it was also distinctly shewn that the freight was payable here.

The captain was directed to take the order or memorandum from these agents and consignees of defendants for the balance due on the affreightments; it was an ordinary delivery of pro-

perty to the agents for which this receipt or order was given, and in no way operated as a waiver of the rights of plaintiffs under charter party.

In support of the rule it was forcibly contended by counsel that there was sufficient in the evidence to show that Louis, Sons & Co. were not only the agents of the charterers, but also for the ship-owners; that the plaintiffs, without the assent or knowledge of the defendants, altered the terms of the charter party, and accepted this order with all its risks. The plaintiffs were referred to Louis, Sons & Co. for payment, and so accepting their note, bill or order, relieved the principals of all further liability; under their contract they were to be paid in cash, and violated their authority by substituting this mode of payment for their own convenience, and that interest in any case could only be claimed from the time of demand expressly made on defendants. In support of these positions counsel cited *Addn. on Confs*, p. 458; *Mursh vs. Pedder*, 4 *Compl.*, p. 257; and referred to *Strong vs. Hart*, 6 *C. & B.*; *Chitty on Con*, p. 681 and 698-701; *Smith vs. Ferrend*, 7 *B. & C.*; *Robinson vs. Reid*, 9 *B. & C.*; *Story on Agency*, Sec. 98; *Robinson vs. Reid*, 9 *B. & C.*, 455; *Canridge vs. Allby*, 6 *B. & C.*, 375; and commented on *Strong vs. Hurt*, and *Mursh vs. Pedder*, 4 *Compl. Reps.* 262.

Under these circumstances the case does not present any of these difficulties which might have resulted from alleged breaches of the provisions of the charter party, in relation to the carriage and delivery of the cargo, or any conflict in the testimony on conduct of the parties, which at times hamper one in clearly ascertaining and defining the exact position of the parties and the questions to be determined by the court. The whole matter is simply resolved into a question of law, whether the defendants be still liable upon the charter party for the balance of freight which remains unpaid.

Now, what is the position of the parties in relation to the covenants they have agreed to perform under their contract of affreightments?

The plaintiffs undertake to carry in their ship this cargo of fish to Barbadoes, and there make a right and true delivery of the same to the agent or assignee of the defendants, whereupon they would be entitled to claim the amount of the freight contracted for.

They made that right and true delivery to Louis & Son, as agents of defendants, who thereupon gave to plaintiffs the order on defendants for the payment of the balance of freight. That

order must be regarded both as an acknowledgment of the delivery and of the balance due.

The course of dealing thus adopted cannot be construed into a fulfilment of their covenant to pay the freight; on the contrary, it is affirmatively shewn in proof, and on the face of this order it clearly appears, that the plaintiffs did not accept or substitute Louis & Son as their debtors instead of defendants, and the order clearly shows that they continued to hold and look to the charterers as their debtors under the charter party for the balance due them on their freight. If there were any evidence of plaintiffs, through their captain or agent having demanded or accepted this order in lieu of cash which had been offered or tendered them, there would have been weight and force in the line of defence or contention of counsel; but, as it now presents itself, we have the agent as receiver of the goods of his principles, furnishing to the carriers of that property a written order on them, setting out the facts of the actual receipt of the goods and a statement of the balance due for the carriage thereof.

Outside of the charter party and the construction that may be applied to it as to the time when and where such freight should have been paid, we have it in evidence that it was verbally understood the freight was to be collected in the same manner as it had been between the owners and the charterers on other occasions and under precisely similar circumstances. That is, on such an order given by their agent to the plaintiffs, presented to defendants and duly credited by them in plaintiffs' current account.

It will be seen on reference to *Robinson v. Reid*, 9 *Ban. and Ctl.*, "that the position of principal and agent, in their relation to a creditor under such circumstances, is governed by a well-defined and recognized general principle, that if the agent of a debtor have funds in his hands, and the creditor, for his own accommodation, voluntarily takes a *security* from the agent, who afterwards fails, having in his hands funds of the debtor adequate to the payment of the demand, the liability of the original debtor is thereby discharged."

Apply that rule of law to the position of these parties and ask if from the evidence it can possibly be held that there is sufficient or any proof of plaintiff, by their agent, the captain, having voluntarily taken a *security* from the agent in this order for the indebtedness of defendants to them? How can such a note be regarded as such a security?

It is nothing more than an order on defendants, and is so properly characterized on the record; and again, it in no way appears that credit was given to the agent by receipt of that order, or that plaintiffs had waived their rights under the charter party against defendants and now accepted Louis and Sons as their creditors in lieu of them on foot of that order.

It is somewhat difficult to see what grounds exist for the contention that this mode of dealing had the effect of discharging the principal, and should be construed into a payment of the debt by the agent. The same principle as referred to by counsel on the argument is also distinctly laid down in *Chitty on Contrs*, p. 681. A creditor may discharge his debtor by taking the security of the agent and giving him a receipt, and inducing the principal, the debtor, to meet the demand as satisfied, whereby he is injured by dealing differently with his agent. It might be again observed that no evidence was given of any of the circumstances attending the delivery of this order by the agents to the captain; and in the face of the facts deposed to it is hard to infer that the plaintiffs did discharge their debtors by taking this order instead of cash, and equally difficult is it to infer that they had accepted that as a security for such indebtedness, and certainly there is nothing to show that any receipt or discharge was given by the captain evidencing that so far as defendants were concerned the demand was satisfied. And if there were backers on the part of the agent of the plaintiffs in receiving this order, it is also clear that to the agents of the defendants blame might equally be attributed for omitting to pay off the indebtedness in cash there and then at Barbadoes.

The case of *Mursh vs. Pedder*, 4 Camp. Reps., cited in the argument, is almost a parallel with the present, and must be accepted as a guide in arriving at a judgment in this matter. In that case the action was also on a charter party, and the facts were there found on admissions and so tried by the court. The defendants were freighters, and the ship duly delivered her cargo at Antwerp to the consignees thereof, whereupon plaintiff became entitled to £400 freight and primage. Defendants had directed the plaintiff, the master, to address himself to one Osy, at Antwerp, for his freight, who was directed by defendants to pay it; the freight was collected by Osy, and, in obedience to instructions from defendants, Osy remitted the balance to them, after deducting the amount payable to plaintiff under the charter party, and plaintiff received, in part payment from Osy, a

bill of exchange, which was not paid; the drawees, as well as Osy, subsequently stopped payment. It also appeared that plaintiff had upon a former occasion been chartered by defendants, and was addressed to Osy under similar circumstances and paid the freight by him. *Gibbs, C. J.*, in delivering judgment, stated it was a dry question of law upon the facts whether defendants were still liable upon the charter party for the unpaid balance of freight; and at the conclusion of a judgment, in no way extended, held that, in his opinion, the plaintiff did not take the bill of exchange in full payment and satisfaction of the amount due him on the freight, and was therefore entitled to recover in the action. It might be observed that the charter parter in that case provided for the payment of the freight on right, &c., "delivery of cargo," and it was construed to mean a payment to be made after the cargo should be delivered.

The case of *Smith & others vs. Ferrand*, cited by counsel in support of defendants' contention, is distinguishable from the present inasmuch as it then appeared that defendant gave plaintiff's agent a bill of exchange, accepted by a stranger, and having a certain time to run; the plaintiff there clearly waived his rights and should bear the loss.

It will also be found that the case of *Camidge vs. Allenby* is in like manner different in its features from the present, but has an alien bearing on the principle before referred to, viz., that if a creditor assent to or receives notes or bills, as money, in payment of his debt, he will do so at his peril. And the case of *Robinson vs. Reid, 9 Benl. & Crel.*, has also an important bearing on the present. It was an action of assumpsit for goods sold, &c., to a broker and ship's husband on account of defendant, the owner of the ship, and the doctrine is clearly stated that unless it be shewn that the plaintiff by his agent distinctly elected to accept or takes notes or a bill instead of cash, in payment of his debt, it would not operate as equivalent to payment by which defendant, or the debtor, would be relieved from liability. If it had been shewn that the master in this case abandoned or waived the right to a cash payment, and accepted, in discharge of his claim for freight and for his own convenience, a bill in payment of his claim, defendants' contention, as before observed, would have prevailed. But from the facts so established here, and the law as applied to these, we must hold that the acceptance of this order by plaintiffs does not operate as a payment to them of the freight, nor relieve the defendants from the liability contracted for under their charter party.

The interest can only be allowed from the time of the demand made on defendants when the order was presented, &c.

Sir W. V. Whiteway for plaintiff.

The Attorney General for defendants.

CURTIS v. EMERSON.

1888, July. HON SIR F. B. T. CARTER, C. J.

Donatio mortis causa—Bank-book—Household furniture—Requisites to be valid.

The deceased about a fortnight before her death told plaintiff to go to the bank and get whatever money was in her name put in plaintiff's name. Plaintiff took the bank-book out of the box of the deceased at her request. Deceased handed it to plaintiff and told her to keep it. She kept it in her possession up to time of deceased's death. At the same time deceased told plaintiff "what was in the house was hers." The plaintiff was a niece of the deceased, and had lived with her thirty-five years, and had not received any wages. The above facts were corroborated by witnesses. In an action by the administrator of the deceased for the bank-book and household furniture,

Held—That the gift of the bank-book constituted a valid *donatio mortis causa*, but that of the household furniture did not. There must be a delivery of and a parting with possession and dominion over that which forms the subject matter of the *donatio mortis causa*.

THIS action is brought to recover the sum of \$600 for money received and \$200, the value of certain articles of household furniture, the property of the deceased Ellen Finn. The deceased died intestate on the 11th April last, and letters of administration were granted to the defendant. The plaintiff claims on each count as a *donatio mortis causa*. She was the niece of the deceased, with whom she had lived thirty-five years, attending upon her aunt and assisting her about household affairs and shop without receiving any wages; deceased had deposited in her name in the savings' bank \$619.09, and in her last illness, about a fortnight before her death, told the plaintiff to go to the bank and get whatever money was there in her own name. Plaintiff at her request took the bank-book out of the box of the deceased, gave it to her; she handed it back to plaintiff and told her to keep it; she kept it in possession up to the time of her aunt's death; at the same time she told plaintiff what was in the house was hers; she did not speak of anything in particular; she had frequently told plaintiff while she was living with her that whatever she owned plaintiff was to have. After the deceased had taken to her

bed, which was some time before her death, plaintiff had the keys with that of her box in which the bank-book was kept. These statements were substantially corroborated by a witness, who had boarded with the deceased occasionally for thirty years; there was a slight difference between this witness and the plaintiff as to the exact words used by the deceased when the book was given to the plaintiff, but not as I regard material, as the gift was of a like character in principle with that in *Hyslop vs. Gyman*, 1 *Adol. & Ell*, 162, where Littledale and Pack, J's., expressed their opinion that it made no difference whether it was absolute gift or a *donatio mortis causa*. Deceased told the witness three days before her death that all that was there (in the house) was plaintiff's; that there was no person else to take it. I do not doubt it was the intention of the deceased to give to the plaintiff the household articles, but unfortunately she did not carry out that intention to render it legally effectual. There was not such a delivery and parting with the possession and the dominion as are required in such a case; if such laxity in making alleged gifts were to be recognized by the courts as valid, wills and testaments would in many instances be dispensed with, and statutable provisions in that respect infringed and evaded. I must, therefore, find against the plaintiff on the second count, and give judgment for \$79, the computed value of the articles. As to the first count I am of opinion the plaintiff must succeed as nothing was left unperformed or incomplete to make the gift effectual; the delivery of the book, which on presentment would justify the bank in paying the amount, and its continuous possession, were sufficient for the purpose. Where a chattel or money is not delivered, the delivery of some effective means of obtaining it is sufficient,—*Snelle, Eqy 173. and notes.*

A late case in point is that of *Taylor vs. Taylor*, 56 *L. J., Chy 597*, where G. T. in last illness showed a deposit note to his daughter, and told her in effect it was to belong to her in the event of his death; plaintiff took the note by her father's directions, placed it for safe custody in a cash box which was kept in her father's back room, of which she had the key, and to which she had resort for household purposes, held good as a *donatio mortis causa*.

Upon the first count I give judgment for the plaintiff for \$619.09, the balance in the Savings' Bank, with any accruing interest, and \$79 for the defendant on the second count.

Mr. E. P. Morris for plaintiff; *Mr. G. H. Emerson* for defendant.

CONFERENCE METHODIST CHURCH
v. GOODALL.

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1888, *December*. HON. MR. JUSTICE PINSENT, D. C. L.

Principal and agent—Excess of authority—Liability of Principal—Requisite authority to sign lease.

An agent of a trustee, residing in Newfoundland, for an estate in Newfoundland, undertook to renew leases which had expired, for long terms of years. For doing so he had no authority except instructions contained in letters from his principal, not under seal, though in other respects, the homologation was complete. To the leases so granted he had attached seals. The law of Newfoundland does not require any such formality to render valid a lease. The trustee having for several years received the rents under the new leases, sold the property and ignored the tenants holding under the new leases, as if no leases had been granted, principally upon the grounds that an authority to an agent to execute a document under seal must be given under seal. In an action of ejectment by a purchaser over the heads of the tenants.

Held—Where a seal is not necessary to a lease as in Newfoundland the principal will be bound if the agent execute it. Even though the agent attach a seal. The seal will have no effect.

THIS appears to be one of several cases in which the plaintiffs seeks to recover from certain tenants and occupiers of houses in the neighbourhood of the George Street Methodist Church possession of the properties held by them, and to eject them from the same. The plaintiffs first obtained a lease of the site of the church, and afterwards, in January last, purchased the freehold of this site together with other land in the vicinity from the surviving trustee and executor, under the will of the late John Thompson.

Upon this other land are several houses in the occupancy of tenants, of whom the defendant is one.

The plaintiffs say they bought upon the assurance that the leases of these tenants had expired, and they treated them as yearly tenants, giving them notices to quit, which expired this autumn.

The defendant in this action states on the other hand that she is the representative of her husband who had formerly been a sub-tenant of his present holding under a ground lease from one Whelan, lessee of Thompson's estate. That Whelan's lease having expired, Mr. Aug. O. Hayward, who was apparently the duly authorized representative of the estate, and possessed of the general management of the property, entered into arrangements by which Whelan's sub-tenants were taken over by Thompson's estate, and their leases renewed at rents which, in

the aggregate, represented to Thompson's estate a considerable advance upon the former rents.

It appears that Mr. James J. Grieve, of Greenock, Scotland, was the surviving executor and trustee of Thompson's estate, and he had duly appointed, by power of attorney, under seal, first his son, Mr. Robert Grieve, and afterwards his son, Mr. W. B. Grieve, to represent him in this country.

The last mentioned held this power at the time of the renewal of the lease to Goodall, and of the lease and sale respectively to the Methodist Conference.

But while this power subsisted Mr. Hayward only was known to the tenants as agent and manager, and he undertook, in the exercise of his assumed authority, to grant to the late John Goodall a renewed lease for a term of thirty years, commencing in 1871, of the messuage he had previously held as sub-tenant of Whelan. Mr. Hayward, being sworn, states that he exercised this authority because, although not empowered under seal, he was authorized in writing by Mr. Grieve, of Greenock, to do so; that he had the entire management of the properties, occasionally consulting the younger Messrs. Grieve here, and being nearly always told by them to use his own judgment.

Mr. Hayward states that, with regard to expiring leases he had seen Mr. Grieve in Greenock, and received his verbal approval and authority to do what he has done in relation to these holdings; but, moreover, that he had authority in writing from Mr. Grieve and his subsequent ratification.

Mr. Hayward dealt directly with Mr. Grieve in Greenock, corresponded with him, received his personal instructions, and to him directly remitted the rents. In a letter written to Mr. Hayward in 1877, Mr. Grieve asks: "If so, have you got new tenants and a lease entered into as proposed"? In March, 1878, he writes: "I would like a complete diagram of Thompson's estate, including waterside premises, just plain lines, and all the houses north side, shewing extent of each lease, also the proposed ground which the Wesleyan body wish to lease and fortify." On another occasion he writes: "You can grant new leases of forty years, subject to a stringent clause of up-keep."

Again, in 1881, "Regarding leases about to expire in Thompson's estate, some consideration must be shewn to the old tenants, but you must not lose sight of my position as a trustee, and that my feelings can not be consulted with every desire to be liberal. Consequently arrears must be closed off, and on the houses being

put in order and a binding clause to the up-keep from time to time, failing which power to enter, you will do the best you can in granting extensions. * * * No doubt my son, Walter, will be ready to give you an opinion on any one case, but you cannot expect him to assume any responsibility," and so forth.

Mr. Hayward deposes that he carried out the conditions prescribed and recommended in these letters, and that he forwarded to Mr. Grieve the plans requested by him, which plans shewed the holdings of the tenants and their names, and moreover, that he from time to time, as changes took place, forwarded to Mr. Grieve, with remittances, rent-rolls; by way of example, one in January, 1874, exhibiting the full particulars at that date, and with regard to the present defendant, containing these particulars:—"John Goodall, yearly rent £3; J. G's arrears squared off. Both G. and S. (Scott) have a lease respectively for thirty years; G. £3 and S. £2 10s."

Mr. Grieve received these rents up to the time of his sale to the plaintiffs.

Mr. Hayward's letters to Mr. Grieve expressed satisfaction with the powers of renewal and extension given to him.

The "homologation" (of the alleged want of which the law-adviser in Scotland, on the eve of the sale, notified Mr. Hayward) seems to have been complete.

When the purchase was made by the plaintiffs they received from him lithographed copies of plans sent out from Scotland, shewing the leasehold lots, with the names of the tenants inserted on the plan.

The facts then appear to be that, practically speaking, Mr. Hayward was the agent in personal communication with and possessing the direct authority of Mr. Grieve, the principal, who states even that Mr. Hayward is not to expect his son to assume any responsibility.

These facts would unquestionably in equity give effect to the transaction between Mr. Hayward and Goodall as a lease of which, if necessary, specific performance would be decreed.

Moreover, the law is, that "If a person purchases an estate from the owner, knowing it to be in possession of tenants, (as the plaintiffs did in this case), he is bound to inquire into the estate which these tenants have, and, therefore, he is affected with notice of all the facts as to their estates."

The law with regard to leases of over three years' duration is, that for which the Statute of Frauds, 29 C. 2, enacts that

they shall be in writing and signed by the parties or their duly authorized agents. The more recent and apparently retrograde statute law of England, 8 and 9 Vic., which declares such leases void unless they are under seal, has no application here.

I gather that in this case the plaintiffs only seek to ascertain what their ultimate rights are, and nothing could be gained to them by obtaining a mere technical judgment in this case as at law, to have it estopped and the substantial rights of the parties settled by a decree in equity after prolonged, useless, and expensive litigation.

But, even at common law, and in this action it could hardly be contended with success that a good title in the defendant has not been made out.

It is perfectly true that Mr. Hayward, possessed only of authority in writing without seal, has executed a lease under seal, and the authorities are undoubted that in cases in which a sealed document is necessary the authority of the agent or attorney to execute the document must also be under seal.

In this country there is no law rendering it necessary that a lease should be under seal, nor is there here any greater practical value in a security under seal than in a parol security.

I incline to the opinion that even at common law, and in the present stage of this litigation, notwithstanding the use of a seal by the agent, although his authority was without such an appendage, that the defendant would be entitled to judgment, and I am, for example, supported in this view by the authorities cited in the American edition of Evans on Agency p. 54 (edition of this year), and by the texts in the notes which is as follows: "The authority to an agent to execute a writing under seal must be given under seal. But where a seal is not necessary to the contract, if the agent had power to execute it, the principal will be bound even though the agent attached a seal. The seal will have no effect."

I adopt an authority so consonant with justice and common sense, and regarding the seal attached to the lease in this case as a superfluity and a work of supererogation on the part of the agent, I give judgment for the defendant.

I would observe upon a point of which no advantage has been taken here, viz., the fact that the lease runs in Mr. Hayward's own name as agent for Thompson's estate; that it would be desirable for the plaintiffs to take an assignment from Mr. Hayward personally, with a view to their being invested with

such a title that no difficulties may arise to them at any time hereafter in the assertion of their just rights.

Mr. McNeily, Q.C., and *Mr. Morison* for plaintiffs.

Mr. Emerson and *Mr. Carty* for defendants.

JOB, BROTHERS & CO. v. NORMORE.

1888, *Decem্বর*. PINSENT, J.; LITTLE, J.

Practice—Mistake—Stay of execution—Injunction—Reform of written agreement.

The defendant agreed with the agent of a planter to proceed as shareman to the fishery on the Labrador. Some time after, and before leaving for Labrador, the agent signed and handed by mistake to defendant an agreement that he was to receive wages. The defendant proceeded to Labrador under the written agreement, but the agent having discovered the mistake, notified the defendant of the same, some days before the opening of the fishery. The defendant continued in the service until the end of the voyage, and sued the planter for wages under the agreement. The magistrate gave judgment for the defendant. The planter filed a bill for a stay of execution and perpetual injunction on the grounds that the defendant was not a shipped servant but a shareman.

Held—That the mistake was clearly established, so as to justify the reforming of the contract, in conformity with intention of parties. Order for injunction made absolute.

THE defendant in this case obtained a judgment in the district court for balance due upon an alleged agreement, under which the defendant was to serve the plaintiff as a servant on wages in the fishery at Labrador.

The plaintiffs have filed their bills in this court to stay execution upon that judgment, and for a perpetual injunction, upon the ground that Normore, the plaintiff in the court below, was really not engaged as a servant on wages, but as a shareman in the fishing voyage; that they paid into court, in the action in the court below, the balance due to him as shareman, and that any further claim is inequitable and against good conscience.

The application for an injunction is supported by the affidavit of *Mr. Watson*, the plaintiffs' agent, who swears:

I, *Ellis C. Watson*, of *St. John's*, aforesaid agent for the within named plaintiff, make oath and say: That the plaintiffs carry on an extensive fishery business in this island, and, among other places, have a large establishment at *Lance-au-Loup*, on the

coast of Labrador employing there about one hundred men as fishermen, some upon wages and some upon shares.

That I am the agent of the plaintiffs for the management of their business at that place; that the defendant and his brother Thomas Normore, had been for several years employed by me as agent aforesaid upon the said establishment at Lance-au-Loup, both being brothers and being employed together, I, as agent aforesaid, would only engage them together upon an agreement that one of them should be shipped for a certain fixed sum as wages and the other should be engaged as a shareman on the usual fishery agreements; that to this agreement the said defendant and his brother had for some years assented.

That in the latter part of May in the present year, the defendant's brother came to me as plaintiff's agent, and requested that he and the defendant might again obtain employment with the plaintiffs in the fishery at Lance-au-Loup.

That thereupon I as agent for the plaintiffs agreed that the defendant and his brother should be engaged as in previous years, the one as a shipped servant on wages and the other as a shareman.

That I as agent for the plaintiffs agreed that the defendant's brother Thomas Normore should be shipped as a servant at the wages of ninety-two dollars for the season, and the defendant's brother as agent for the defendant agreed that the defendant should be shipped as a shareman. That in accordance with this agreement the defendant's brother, Thomas Normore, was shipped as a servant on wages, and the agreement in writing signed between the parties by me on behalf of the plaintiffs. That I was at that time actively engaged in preparation for the fishery and was from time to time signing the agreement between the plaintiffs and their fishery servants at Lance-au-Loup.

That it was well understood between me and the defendant that the defendant was to be employed as a shareman, inasmuch as his brother the said Thomas Normore was to be employed for wages. That sometime after the said Thomas Normore the brother of the defendant had signed the agreement for wages, the said defendant came to me, the plaintiff's agent, and asked for his agreement.

That I, not remembering that I had given an agreement for wages to the defendant's brother as hereinafter set forth and believing the defendant to be his brother, the said Thomas Normore, by mistake and in diversion to the defendant, the agreement or shipping paper for wages which defendant now

has, and upon which he has sued in the central district court. That it was the well understood intention, design and agreement of the parties when the said shipping paper or agreement was signed, that the defendant should be shipped as shareman and not upon wages, and that the defendant has always admitted the same.

That in accordance with said agreement, as the same was understood between the parties, the defendant proceeded by the plaintiff's steamer to Lance-au-Loup, where he arrived on or about the tenth day of June. That I, the plaintiffs' agent, arrived on or about the twentieth day of June.

That the fishery season at Lance-au-Loup did not commence until the twenty-ninth day of June, and I, the plaintiffs' agent, upon my arrival at Lance-au-Loup discovered that a mistake had been made as to the agreement between the plaintiffs and the defendant, and their agreement with the defendant's brother.

That immediately upon the discovery of said mistake I, as plaintiffs' agent, sent a message to the defendant, informing him of the said mistake, and requesting him to bring to me the said agreement, in order that it might be reformed in accordance with the true intent and meaning of the parties thereto.

Said message was sent within a week of the commencement of the fishery at Lance-au-Loup. The defendant took no notice of this message till the end of the month of August or the beginning of September, although he subsequently admitted that he had received the same.

The plaintiffs were at all times ready and willing to carry out the well understood agreement, and were ready and willing to pay him the amount due to him as a shareman, however much this amount might have exceeded the fixed sum which in the agreement, by mistake entered into, was allowed for wages, and of this fact I, as plaintiffs' agent, informed the defendant, which the defendant well knew.

The defendant, on the seventh day of November now present, issued a summons out of the central district court against the plaintiffs, claiming the sum of ninety-two dollars, which was the amount of wages assured to be payable to him under the agreement entered into by mistake.

The defendant admitted upon oath, that when he entered into the said agreement he believed that he was being employed as a shareman, and not as a servant on wages. It was not until he left St. John's in plaintiffs' steamer that he discovered the shipping paper or agreement set forth that he was to be employed on wages.

The defendant also admitted that the fishery at Lance-au-Loup did not commence till the 29th day of June, and that in the first week of July he received the message from me, as plaintiffs' agent, requesting him to come to me, as said agent, to have the said shipping paper reformed.

The defendant in this suit (plaintiff in the lower court) files no affidavit in contradiction of this statement, but through his counsel admits that he was to have been engaged as a shareman, and believed himself so to have been, until he read the agreement a day after its execution; but he contends that he had a right to take advantage of it, and that he entered into and continued in the plaintiffs' service under it until the end of the voyage.

We cannot discover that substantially there was any difference between the period and manner of service under the one agreement and under the other, and the defendant (Normore) received notice of the mistake from the plaintiffs' agent at the earliest possible time.

The court will, in all such cases of alleged mistake, require to be abundantly satisfied and convinced that a mistake which ought to be corrected has been made, before it will interfere to alter and rectify a written agreement.

The rule applicable to such cases is summed up in *Story on Equity Jurisprudence*, in language which we cannot do better than adopt in this case: "If the mistake is clearly made out by proof entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intents of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy."

The conditions upon which equity will interfere have been abundantly fulfilled in this case by evidence entirely satisfactory, and in itself equivalent to an admission, and the reasons for relief are not only cogent but conclusive.

It would be, under the circumstances of this case, a plain denial of justice and contrary to all honesty, conscience and good faith, to allow the judgment to be executed, a judgment which the court below could not well avoid from its want of equitable jurisdiction.

There is no room, therefore, in this case for the great reluctance with which we should as a rule entertain applications to

alter or disturb agreements in the fishery after the close of the season, and the order for the writ of injunction must be made absolute; but as the difficulty originated in a mistake on the part of the plaintiffs' agent, the rule will go without costs.

Mr. McNeily, Q.C., for plaintiff (Messrs. Job).

Mr. E. P. Morris for defendant (Normore).

CURRAN v. CARNELL.

1888, *December*. HON. MR. JUSTICE PINSENT, D. C. L.

Vendor and purchaser—Covenant for good title—Breach—Measure of damages.

The defendant being a joint proprietor, in unpartitioned landed property, sold his interest to the plaintiff. The deed of assignment contained the measurements. Shortly after the purchase, the property was partitioned, and subsequently sold to a third party. An adjoining proprietor in an action of trespass recovered a certain portion of the land, which under the partition deed had become the plaintiffs. The partition was then rectified and the plaintiff claimed damages against the defendant for breach of covenant of good title; plaintiff having had to indemnify the party to whom he sold to the extent of the rectification. The defendant contended he had only sold his "right, title and interest," that he was an innocent party, and that at the most the only damages to which he could be made respond to, would be a proportion of the original purchase money.

Held—The covenant was absolute. The measurements falling short of the description, the plaintiff was entitled to be indemnified. The measure of damages was not to be estimated on the speculative value of land, but in proportion to what was paid for the whole by the plaintiff.

THIS is an action upon covenant for good title.

Without embarrassing the case with reference to much evidence which does not really affect the issue between the parties, the circumstances are shortly these: that the defendant, being a joint proprietor with Elizabeth Carnell of land at Quidi Vidi, immediately east of the penitentiary, fronting on the Forest road, sold his interest to the plaintiff, who is a speculator in land, for the sum of £150, the plaintiff paying commission and expenses.

After the purchase the plaintiff entered into an arrangement with Mrs. Carnell for partition of the property, he getting the western half and she the eastern half.

The plaintiff then, and very shortly after his own purchase, sold his own part to Mr. Alfred Parsons.

Subsequently to this sale, Mr. McCowan, who had purchased land to the east of Mrs. Carnell's half, claimed, and recovered, in an action in which she sued him for trespass, eighty feet of the frontage on Forest road and one hundred and eighty feet of the land in the rear abutting on Quidi Vidi lake.

Now, Carnell, the defendant, had sold to the plaintiff an equal interest with Mrs. Carnell in four hundred feet frontage, in other words, a lot having a frontage of two hundred feet running back to Quidi Vidi lake.

After the judgment in favor of McCowan, plaintiff and Mrs. Carnell had to rectify their partition, and this reduced the lot acquired by Parsons under purchase from Carnell to 160 feet frontage instead of 200 feet, and 90 feet rearage.

Plaintiff being then required to indemnify Parsons for his loss, was obliged to make a purchase of land from McCowan at a cost of £48, from Mrs. Carnell of £32, besides paying to Parsons a sum of £30, as balance of compensation in money. The plaintiff also states that there being an outstanding leasehold term of two years, of which he had been uninformed, he had to pay the lessee £6 to get rid of it.

The plaintiff claims in this action to recover these sums and the commission and expenses he had incurred, as representing the damages sustained by reason of the defendant's breach of covenant for good title.

The defendant, who is not resident in this country, contends that he was an innocent party in the transaction; that he sold only his "right, title, and interest," and that if he is liable to respond in damages at all, it is only for a sum in proportion to the original purchase money received by him.

The description in his conveyance is, "All the estate, right, title and interest, *being one undivided half* of and in all that piece or parcel of land situate on the north side of the road leading to Quidi Vidi known as Forest road, and measuring by the said road four hundred feet or thereabouts," &c., and his covenant is that he has "good right, full power and lawful and absolute authority to sell, &c., the *said land and premises hereinafore sold,*"

The covenant is absolute in its terms, not qualified as in the cases cited for the defendant.

No language could express more clearly a sale of specific land of the measurements above described, and therefore the

measurements falling short of the description, the defendant is liable to indemnify the plaintiff for his loss.

The next question is, how is that loss to be estimated?

I am of opinion that it is not to be calculated upon the speculative value of the land, nor upon the amount that the plaintiff received for land to which he proved to have no title.

The plaintiff could never by purchase from the defendant, have become lawfully possessed of the excess so as to enable him to sell or to speculate at all.

He is entitled, in my judgment, only to be paid back his money with interest and expenses to the extent to which he originally received from the defendant no value for it.

I estimate the value of the land which he lost, as nearly as I can go to it, in the absence of evidence upon the point, at about one-third of the original purchase. That would be represented by the sum of £50, augmented by interest £18, and commission £2 10s. I disallow the claim for amount paid to get rid of a lease of which truly there is no formal proof, and I do not regard the question of other expenses, as they are not shewn to be any greater upon the sale at £100 than they were upon a sale for £150, and I therefore give judgment in favor of the plaintiff for £70 10s., late currency, now equal to \$282.

Mr. Morison for the plaintiff.

Sir W. V. Whitway, Q.C., for defendant.

1889, January. HON. MR. JUSTICE LITTLE.

*Legislature of Newfoundland—Territorial dominion—Seizure of foreign ships—
Forfeiture—Jurisdiction of magistrate.*

The defendants (foreign fishermen) were proceeded against before a magistrate for violation of the "Newfoundland Bait Act, 50 Vic., Cap. 1," viz., purchasing bait fishes for exportation and bait purposes, without having taken out a license provided for in said act. The magistrate convicted the defendants, fined them and declared their vessels confiscated and forfeited. The defendants appealed on the grounds (1) That the vessels were outside of the three mile limit when seized, and there was no power to seize outside the territorial waters; (2) No exportation; (3) No power to board a ship under act; (4) No power in magistrate to confiscate vessels; (5) That the authority of our laws ended at low water mark. The Supreme Court sustained the decision of the magistrate, except on the question of the confiscation of the vessel, which was over-ruled, and

Held—(1) That the territorial jurisdiction extends to three miles outside a line drawn from headland to headland, and that the acts of the Newfoundland legislature have full effect in that territory. (2) That the terms and language of the act contain no authority to confiscate vessels or property. (3) That the indispensable conditions requisite to support a forfeiture are absent from the act. (4) When no procedure is pointed out for the recovery of penalties, the proceeding must be by action in the Supreme Court.

THE proceedings in these matters arise in this court on appeal from two judgments rendered on the 16th day of July last by Thomas O'Reilly, Esq., stipendiary magistrate at Placentia, on prosecutions instituted and conducted before him against the accused Joseph Delepine, captain of the schr. *Amazon*; Auguste Armond Chapin, and Francis J. Roguieo, part of the crew of said vessel, and Louis Jean Le Mache, captain of the schooner *Virginia*, and Daniel Eugene Lamy and Jules C. Chonaminy, members of the crew of said vessel, for alleged breaches or violations by them of the provisions of the Colonial Acts 50 Vic., cap. 1, entitled "An Act to regulate the exportation and sale of herring, caplin, squid, and other bait fishes," and the 51 Vic., cap. 9, passed in amendment thereof.

In the interests of the parties, and at the instance of counsel, the hearing on appeal was partially had before me at St. John's, and concluded at the sittings of the court on circuit, held by me at Placentia in August last.

The record sent up and filed in this court of the proceedings before the magistrate solely embodies the history, facts and data to which attention can be given in the hearing and consideration of the appeals, in the application of the law, and the determination to be arrived at by this court.

The initial step in the magisterial proceedings appears to have been the complaint taken from John Sullivan, a sub-inspector of constabulary and a commissioner appointed under the Acts referred to.

Under this complaint formulated charges were regularly and specifically made against the accused, and are set out as follows: That defendants, on or about the 8th of July last, did purchase, at or near cape St. Mary's, a part of this colony, a certain quantity of bait fishes, that is to say, caplin, for the purpose of exportation for bait purposes, contrary to the Acts 50 and 51 vic., without the license provided in said Acts, and

* * * * * defendants, on or about the said time had in their possession and were conveying a quantity of bait fishes, to wit, caplin, within the limits aforesaid, and failed to produce a license according to the provisions of the said Acts."

The defendants being so charged, entered, through their counsel, a plea of not guilty, and on the inquiry or trial thereupon, the evidence of the following named witnesses appears to have been taken in support of the charges made on the part of the Crown. Mr. Sullivan, who made the complaint; Joseph Snook, police constable; Wm. H. Cross, master, and Lewis Young, mate of the *Ingraham*, the steamer engaged in this particular service of the Government of the colony; John B. Bradshaw, planter and vessel owner; Commander Geo. Robinson, R. N., a commissioner of the Government and in charge of the expedition, and Theodore Benson, police constable.

From the recorded testimony of these witnesses it would appear that Inspector Sullivan and Commander Robinson, were, as such commissioners, duly appointed for the observance and enforcement of the provisions of these Acts on the southern and western parts of the coasts of this colony during the fishing season of 1888; that Commander Robinson, Inspector Sullivan, and the men under their control were on board of the steamer *Ingraham* in the neighborhood of cape St. Mary's at or about six o'clock on the morning of the ninth day of July, their steamer when being two or three miles inside of the cape, they discovered a number of small craft at anchor and under sail at or near Bear's Cove; the wind was very light and some of the craft were shortly after found to be reaching off the land. The steamer came up with two of these, and having signalled them to lay to, they did so, and on being boarded they were found to be French fishing schooners. These schooners were inshore

from the *Ingraham* and about one mile from Island Head. The *Ingraham* had an official flag flying, and the schooners shewed the French flag.

Mr. Sullivan, on boarding one of these vessels, found her to be a French fishing schooner, called the *Amazon*, Captain Delepine, one of the accused, hailing from St Pierre. The rail and side of the schooner were covered with caplin spawn, quite fresh, and caplin and salt were scattered about the deck. In the hold were large bait pounds, filled with caplin, freshly salted, one on either side of vessel, and between these was a third in which were about two hogshheads of caplin, apparently only taken quite recently from the water. It appeared Mr. Sullivan was unable to speak French, and the captain was equally ignorant of English, and on being asked by the former what brought him *in there*, he made no intelligible reply, and when informed that his vessel would be seized, it is said, he appeared to understand, and raised no objection or difficulty. This vessel was fitted out for the bank fishery, and had five or six dories on board, cables, salt, trawls, and all necessary appliances for its prosecution. There was no license to take bait or caplin, produced by the captain or found on board, and from the appearance of the caplin they were taken within twenty-four hours of that time, and were certainly not older, the bloom was on them, and as stated that only remains a short time after taking them from the water.

One of the other witnesses corroborating these statements (police officer Snook), deposed that the captain of the *Amazon* brought him into the hold, and pointing out the middle pound gave him to understand that the caplin in it were obtained by him from an English fisherman in exchange for some bread; that the caplin in the other pounds had been taken at Miquelon. It was about one-half mile from Sear's Cove, in St. Mary's Bay, they had boarded the *Amazon*. That the weather was calm and hazy from Saturday to the Monday morning they so boarded these vessels. Captain Cross, of the str. *Ingraham*, also stated that these vessels were not more than a mile off Island Head when they were taken by the *Ingraham*; that Miquelon is one hundred miles distant therefrom, and a schooner, such as one of these, would take two or three days to make the trip or run, with the weather that prevailed and was experienced by those on board the *Ingraham* for some days prior and up to the morning of the taking of these vessels.

The evidence on the part of the defence was given by Captain Delepine and four of his crew.

From their testimony it would appear that the *Amazon* sailed from St. Pierre on the 7th of July; had on board at the time a full baiting taken at Miquelon; in consequence of calms, fogs, and the currents, they got on the coast of Newfoundland, but did not come to seek bait; some caplin had been offered to them by an English fisherman, and was taken on board, and some bread given in return for it, and had no idea the taking of such a small quantity would be a breach of the law. The *Amazon* was under sail when overhauled or taken by the steamer. It was between three or four miles off the land. The parties boarding the *Amazon* did not ask for a license, nor was any produced. It was deposed to that no bait was taken, seined or bought or sold by any one of the crew on this coast. That Miquelon is distant from Cape St. Mary's about 100 miles, and the *Amazon* was *en route* to the banks on a third trip or voyage. That caplin would remain fresh-looking dry salted for thirty-six or forty hours, and this baiting was taken at Miquelon, excepting *about two barrels* obtained on this coast. That after making the land near Cape St. Mary's they anchored and obtained the two barrels of caplin referred to, and got underweigh again at daylight, and it is stated the wind was light and on the shore, and the *Amazon* about one-half or three-quarters of an hour underweigh when taken by the steamer. Mr. Miller was on board from St. Pierre and remained; he did not understand much French. Salt had been thrown on the caplin so taken on board near the cove, before the officers came on board.

In the case of the *Virginia*, it was deposed to by Commander Robinson that when first seen by him she was about one-half mile from the land, and when taken in tow by the steamer the vessels were about three-quarters of a mile or one mile off the coast; that he directed the boarding of the *Virginia* by police officer Benson and four others. From the sworn statement of those who boarded it would appear that Benson, on boarding asked the captain if he had caplin. In answer the captain said, yes. The hatches having been removed, there appeared to be about 50 brls. of caplin salted and appearing quite fresh in the hold. It further appeared that the captain gave Benson and the others to understand that he obtained the caplin from an English fisherman at Cape St. Mary's. No license was produced. The deck was covered with caplin spawn; the weather on Saturday previous was calm; on Sunday a high wind prevailed, with showers and fog outside. Other statements follow of conversations with

the captain as to what he paid for the caplin, and what Benson understood him to say in relation thereto. It was also deposed to in this case that there were caplin on the deck of the *Virginia* quite fresh, apparently not more than two or three hours out of the water, and that the caplin in her hold appeared to be fifteen or twenty hours salted.

The defence on the part of the master and crew of the *Virginia* was supported by the evidence of the master (Captain LeMaitte) and Daniel E. Lamy. From their statement it would appear they left Miquelon on the 7th of July, and had their bait on board. They got in on this coast at eight or nine o'clock on Sunday night; wind calm and weather foggy. On leaving the following morning, the *Virginia* was boarded by Benson and others from the *Ingraham*. The captain at their request had his hatches removed, and in answer to their questions informed them that he had obtained his caplin at Miquelon and some from an English fisherman from the shore, to whom in return for them he had given a mooring seine for his grapnel; that this quantity so obtained was not more than six dip-nets full, and that it was untrue that he had stated to the officers of the protection service that he had purchased the caplin at Cape St. Mary's at ten francs per barrique; the only thing he told the policeman by gesture and language was that the few caplin he got there from the Englishman was given to him for a piece of oein (buoy rope), and he held up his hands to show its value.

Now, this summary contains the gist of the evidence taken before the magistrate, and at the close of both cases the like judgment was delivered in open court and appears on the record over the magistrate's signature.

The judgment in the case of the *Amazon* bears date the 16th July, and is as follows:—

"Judgment. Auguste Armond Chapin and Francis Joseph Roger, discharged; Joseph Delepine fined \$200, and in default of payment, two months in gaol, and the additional penalty of having the vessel used by him confiscated. Proclamation to that effect being accordingly made and the *Amazon* declared confiscated."

Magistrate's Office, Placentia, July 16, 1888.

(Signed), T. O'REILLY, *stipendiary magistrate*.

A like judgment was in due course so declared and entered in the case of the *Virginia*.

In both cases a notice of appeal was given by Mr. Scott on the 16th day of July to quash the convictions and set aside the judgments so rendered, on the following grounds, as set out in such notice: 1st, that inasmuch as the said accused, Delepine, was not found hauling, catching, or taking, or conveying, any of the fishes referred to in said act; and further, as the preliminaries required by the 2nd section of the first act were not complied with, and because no power to board a vessel under the circumstances are conferred by either of said acts, the seizure of vessels belonging to citizens of France in these waters was illegal and not warranted by said acts, and that consequently the said vessels and captains were not legally before the said magistrate, who therefore had no power to adjudicate, &c.

2nd. That the boarding and seizing of a French vessel outside three miles from the shore and coasts of Newfoundland is not warranted by said acts.

3rd. That the evidence on the trial did not prove a purchase or exportation within the meaning of the said acts.

4th. That the matters shewn on the trial did not nor are they such as to constitute a violation of said acts.

And subsequently a final exception or ground of appeal appears on file on the 16th August, and with consent of counsel, formed part of the grounds on which the notice of appeal was in the first instance given and was so regarded in the argument which followed. This exception was taken to the magistrate's right or power to confiscate the vessel so taken.

Pending the hearing and adjudication on the appeal so taken, the parties gave security for the payment of the amounts of the penalties thus imposed; but the vessels so confiscated were dismantled and retained in the custody of the officers of the Crown. In view of the necessarily protracted time that would elapse before delivery of final judgment, owing to the limited time the court had to hear the matter at Placentia and to attend to the holding of sittings at other localities on its circuit, and more particularly as grave doubts admittedly existed as to the legal effect of these provisions of the statute under which it was contended a right of such forfeiture existed, the court considered it right in the interests of all the parties, that the vessels should be handed over to the owners on such bail and conditions as might be agreed on. This was accordingly done on the 22nd of August.

The exceptions forming the grounds of this appeal, as pre-

viously noted, were the subject of a lengthened and ably sustained argument by Sir W. V. Whiteway and Mr. Scott on behalf of the defendants, and Mr. Greene, Q.C., in support of the judgments.

Much stress and importance was given by counsel in the course of argument to the alleged inoperative character of the provisions of the Act as applied to foreign vessels, in navigating or using that part of the high seas washing the shores or surrounding the coast of this island; that in such cases the power, force, and authority of our laws ended at low water mark, and *a fortiori*, by no inference or implication could effect be given to this enactment to support the assumed authority of the commissioners in boarding and seizing in the place and manner deposed to.

Such propositions are not unknown to our courts of law, and have been the subject of judicial criticism on several important occasions, and are now in the main settled and determined on in consonance with long established and well known principles of international law. However, in deference to counsel, and as some weight might attach in the minds of the parties to the argument thus advanced, it may be necessary briefly to cite from the authorities a few general principles in support of territorial rights and claims now regarded as incorporated with and forming part of the constitution of the colony and the law of the land. We find, for instance, in the authority referred to by Mr. Scott, the case of the *Queen vs. Reyn, 2 Ex., D., Lindley, J.*, in delivering judgment, states, *inter alia*, "It appears to me to be now agreed by the most esteemed writers on international law that, subject to the right of all ships freely to navigate the high seas, every state has full power to enact and enforce what laws it thinks proper for the preservation of peace and the *protection of its own interests*, over those parts of the high seas which adjoin its own coasts and are within three miles thereof." In the same case, *Cockburn, C. J.*, refers to the artificial maritime boundary of a state, fixing it at the usual distance, proceeds with a quotation from a treatise on maritime rights, as follows:—"Every ship which is found within this line must be considered in the waters of the state of which it bounds the sovereignty and jurisdiction, and those on board must conduct themselves as though they were on the shore, doing nothing which the government has a right to prohibit as prejudicial to the property or safety of the state."

This "*jurisdiction*" in the state over the area so referred to,

is recognized by *C. J. Cockburn* to mean the power of applying the laws applicable to the persons on the land, to all who are within the territorial waters, and the power of legislating in respect of it. We also find other observations on the general subject;—for instance, that no nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through those waters subject to its law, otherwise than in respect of matters respecting navigation, or connected with its revenue, local fisheries, or its neutrality.

In Kents commentaries on international law, p. 112. we find it laid down ‘that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety and for some lawful end, * * * and this is usually calculated to be a marine league.” And Dr. Lushington emphasizes these dicta in his judgment on the case of the *Annapolis*, *Lushington Repts. V., p. 306*, “Within however British jurisdiction, namely, British territory, and at sea within three miles from the coast, and within all British rivers *intra fauces*, &c., * * * I apprehend the parliament has an undoubted right to legislate. I am further of opinion that parliament has a perfect right to say to foreign ships, that they shall not, without complying with British law, enter into British ports, and if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by parliament.”

It is unnecessary to make further reference to authorities, in support of a doctrine so well recognized. So far as it relates to our interests, and having place in our judicial proceedings, it has been defined and settled on several occasions by the supreme court of this colony, particularly in the judgment pronounced in the case of the *Anglo-American Telegraph Company* (affirmed on appeal by the Privy Council).

The Chief Justice’s ruling is as follows: “I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to headland of the bays, and that the local government, being the Queen’s government, representing and exercising within the limits of the governor’s commission, which contains nothing restrictive upon this point, * * * is the same with the Imperial government; * * * and that subject to the Royal instructions and the Queen’s

power of dissent, the acts of the local legislature have effect and operation to the full extent of the territorial jurisdiction."

There should, then, be no question as to the liability and amenability of any foreign ships for offences committed by the crews thereof within the territorial waters of this colony, contrary to the public laws of the legislature made for the protection of our revenues, fisheries, or other public interests.

That being so, we are now to pronounce as to the sufficiency of the evidence on which the conviction or judgment of the magistrates rests, in the charges entered against those parties.

On a careful review of the evidence, and of the circumstances surrounding the cases, and giving due weight to the statements and explanations of counsel, I cannot find that the magistrate, under the circumstances, could decide otherwise than that the accused parties had committed a breach of the provisions of the acts of the legislature, and rendered themselves liable therefor. The evidence of commander Robinson as to the position of the vessels, at the time he first saw them, and when boarded and taken in tow, is entitled to marked reliance, not only because of his position as head of the particular service in which he was then engaged, but because of his professional standing and nautical experience; that statement of the distance of these vessels from the shore is strongly corroborated by the captain and mate of the *Ingraham*, and by Inspector Sullivan; they and the other parties on the part of the Crown would appear to positively establish the fact that these vessels were within the territorial waters at the time of their being so boarded. (And it may be noted that no treaty rights are reserved to foreigners on this part of the coast of the colony).

Moreover, it may be observed that, in the hurry of getting under way and of sailing from their night's anchorage, the defendants might have been unable to speak with certainty on their distance from the land, when so visited by the officers of the cruiser. Weighing the evidence on this all-important point, it must be taken as supporting, beyond a reasonable doubt, the reception given it by the magistrate.

Then, as to the sufficiency of the evidence in proof of the charge of having taken or purchased these bait fishes within the prescribed limits. It is apparent that these fishing vessels had been anchored for some time in Lear's Cove, or its vicinity, where bait was being procured by numbers of other craft. That on leaving their anchorage they were found with all of the evidences on the sides and bulwarks, rails and decks, of

caplin having been, as stated, recently taken on board. In the hold, fresh bait (dry salted) was found in bins or pounds, as attested to by the witnesses who boarded these vessels on the grounds. And aside from the evidence, such as it was, of the two experts examined at the trial, there can be no doubt from the other testimony but that the caplin in these pounds were freshly salted.

These circumstances might not have been considered sufficiently convincing in themselves in support of the charge that all the bait on board these vessels had been so taken, but the direct evidence of the defendants themselves removed all questions or doubts as to a portion, and according to their statements a very small portion, of the very large quantity on board their respective vessels. They say that only two barrels, in one instance, were taken in return for some bread, and five or six dip-nets full were taken in case of the *Virginia*, in exchange for some mooring-gear, and the first were merely to be eaten by those of the crew on board the *Amazon*.

It is scarcely necessary to observe on the contradictions that arose in the course of the taking of the evidence, in relation to what was understood by the parties to have been said about the purchase of the caplin, so admitted to have been taken on board.

The magistrate having had the advantage of personally examining the witnesses, and having them confronted, was much more capable of forming a just estimate of their testimony than one would be from a perusal of a written report and I have no doubt in the impartiality exercised on the hearing and adjudication of the matters thus passed on by him.

It must appear rather strange that if the caplin taken on board the *Amazon* were intended to be used as food by the crew, they should have been also lightly dry salted in the same manner as the rest of the caplin, said to have been taken only the day previous at Miquelon.

The evidence of Captain Cross and others on the state of the weather, the distance of Miquelon from the place where these vessels were found, and the impossibility under the circumstances, as they depose, of such vessels being enabled to cover that distance from Saturday to Sunday evening, when they are said to have anchored near the cove referred to, must naturally have created grave doubts as to the entire correctness of the defence relied on. From the strong circumstantial evidence, and the admissions so made by the defendants, I cannot under

the circumstances recognize any substantial grounds for excepting to the construction the magistrate placed, in the exercise of his judgment, on this evidence.

Now, under such data and state of facts, what are the terms of the acts and the particular provisions thereof, alleged to have been violated by the defendants, and justifying the imposition of the fines inflicted They are principally to the following purport and effect:—

“Be it therefore enacted: No person shall export, or cause or procure to be exported, or assist in the exportation of, or haul, catch, *purchase* or sell, for the purpose of exportation, or sell or purchase for the purpose of sale, any herring, caplin, etc., or other bait fishes, etc., etc.

“2nd. Any person found hauling, catching or taking, shipping or conveying, any of the said fishes within the said limits, or any person having any of the said fishes in possession, may be examined on oath by a justice of the peace, etc., fishery-warden or person commissioned, etc., and on refusing to answer, etc., or failing to produce a license as above mentioned, such justice, officer, etc., or person commissioned, etc., *may seize the vessel* in or on board of which such herring, caplin, etc., or other bait fishes, shall have been hauled or caught, or put, kept, shipped, carried or conveyed, or on board of which the same may have been found, her tackle, apparel, furniture or outfit, and bring the same before any stipendiary magistrate, and the person so refusing to answer, answering untruthfully, or failing to produce the said license, shall be guilty of an offence against this act.

“5th. Every person guilty of a violation of any of the provisions of this act shall, for the first offence, be liable to a fine not exceeding one thousand dollars, and in default of payment, etc., to imprisonment for a period not exceeding six months, etc.

“6th. Provides for mode of recovering of the fines, etc., but makes no reference to forfeitures, etc.”

It will also be seen that, by the Bait Act of 1885, the first section defines the words “export” and “exportation,” and that they shall be construed to signify a conveyance to any place or for any purpose outside the territorial limits.

It was contended that there was an entire absence of any proof of the defendants having been guilty of a breach of any one of these acts, and that the word “purchase” did not apply to or include in its signification the bait or caplin obtained in the manner or under the circumstances admitted by the defendants.

But I am unable to agree with such a construction, as I regard the word purchase to mean or signify “the acquisition of anything by payment of *an equivalent*, or in return for money or kind.” Such a line of defence would only amount to an endeavor to escape liability by a palpable evasion of the plain and distinct meaning of the language of the act. It was also urged

that there was no proof of exportation outside the territorial limits, that the bait was not carried or exported as an accomplished fact, to any place outside the limits; but under the very wording, language and meaning of the first sub-section of section one of the 50 Vic., the offence would be complete if the party charged *assisted* in the exportation, &c. It must be obvious that if the party was actively engaged in the assisting, he could not escape liability on the ground that the vessels had not actually passed the limits of territorial jurisdiction. To advance such a proposition, in the face of the contention attempted to be maintained, that the vessels were without the limits, is, to say the least of it, rather inconsistent and unreasonable; and moreover, the position thus assumed appears to be determined by the terms of the second section of the first act, on which the finding of the magistrate appears mainly to rest. An extended analysis of the evidence, and of the many exceptions taken as to its insufficiency to support the charges against the defendants, is obviously unnecessary.

It may therefore be concluded, that as a matter of fact, these fishing vessels were within the territorial waters of this colony when boarded by the officers of the government, and had been anchored at or near Lear's Cove during the night previous and up to the time of their having been first discovered by the commissioners; that caplin for bait and other purposes had been taken on board of them whilst there, and that no justifiable reason was given for their presence in that place, nor were they licensed to take such bait fishes in the waters of the colony.

The amenability of foreign vessels to our municipal laws, and even police regulations, under such circumstances, has been placed beyond question or doubt, as appears from the authoritative references already cited. They are (when not exempted by treaty) as much subject to the laws of this colony when within its territorial waters as are British vessels, and if the crew or owners of these vessels infringe these laws whilst there, they can be held accountable by and answerable to the local tribunals and authorities. It is true that these waters are open and free to them for all purposes of navigation, but they are subject nevertheless whilst there to the like restrictions as are imposed on the subjects of the Crown.

Applying the provisions of the law to the facts established in evidence, it must be apparent there were sufficient grounds to warrant the adjudication of the magistrate so far as it ex-

tends to the imposition of a fine or penalty on the defendants. It may be argued that, according to the literal interpretation of the act, any fishing vessels of this colony found with bait fishes on board within the said limits, and not having a license as provided for, are subject to the penalties named, and that this could never have been intended by the legislature. Nevertheless, such is the language used and such would be its effect.

The right of seizing, so expressly given, and as an indispensable preliminary, the right of visiting within the zone referred to, any and every vessel that may be reasonably suspected of having bait fishes on board, under such circumstances is, in my opinion, within the scope and authority of those empowered by the government to enforce the provisions of the acts. The seizure following the visitation and inspection of the vessels is confined throughout the act to mean a seizure for the purposes of magisterial investigation; the boarding, as already observed, must be a pre-existing right to that of seizing for these purposes.

Referring now to that part of the judgment of the magistrate directly declaring and expressly intended to operate as a forfeiture of these vessels, their gear, furniture, appliances, etc., aside from its manifest severity, I must declare it to be wholly unwarranted by the terms or language of the acts. I am unable to discover from any reasonable construction of the provisions of these acts, having reference to forfeiture, that the legislature intended to confer the exercise of any such extensive and unprecedented jurisdiction on the magistrate.

This magisterial jurisdiction is claimed to be conferred under and by the ninth section of the act of 1887, which briefly provides that "Any person who shall violate any of the provisions of this act, in addition to the penalties provided in the fifth section hereof, *shall be liable* to have his vessel, etc., seized in manner aforesaid, her tackle, apparel, furniture and outfit forfeited and sold by public auction."

This bare declaration of a mere liability is unaccompanied by any direction as to the form of proceeding to be observed by the authority who may adjudicate in the matter. There is an absence of any language conferring jurisdiction on the magistrate who may have adjudicated in the matter of the fines imposed by the fifth section. There is nothing enabling the party lodging the information to proceed.

The sixth section of the act provides that "All *fines* incurred under the provisions of the act may be sued for, etc., before a stipendiary magistrate by any person who may sue for the

same," etc. But no authority is in like case given in reference to any proceedings against the vessels *liable to forfeiture*.

And again, a right of appeal is given by the seventh section from magisterial adjudications under the act, and due provision is made for security for the appearance of the party convicted, and for his release if imprisoned, pending the appeal, but the act is entirely silent as to the release or return of the vessel that may be so made "liable to forfeiture" at that time and under the same judgment so appealed from.

It must be recognized that the construction thus attempted to be imposed on the section referred to, would be creative of a new power and jurisdiction in a tribunal of heretofore limited authority.

It is scarcely necessary to observe, in reference to these vital omissions, or on the strained construction sought to be imposed in administering the law under this rather loosely constructed act, that rights, either public or private, cannot be taken away or hampered by the mere implication from the language used in a statute, and that express language is absolutely indispensable in order to confer or take away legal rights, and a distinct and unequivocal enactment is required for the purpose of adding to or taking from the jurisdiction of a court of law.—*Hardcastle*, 82.

There is no mode pointed out in this act in or by which the forfeiture is to be proceeded with, nor is any particular person specified who may sue, or to whom the proceeds may go. These are matters that can only be expressly provided for by statute. We find in *1 Walford on Parties to Actions*, p. 264, that a common informer cannot have a right to sue for a penalty except where power is expressly given for that purpose.

The intention of the legislature as to conferring this extraordinary power and jurisdiction in the disposition of vessels under such circumstances, must therefore be gathered from the language of the statute itself.

"If the legislature intended more, or as to what it did intend, we can only say, that according to our opinion, they have not expressed it." A *causis omissus* can in no case be supplied by a court of law, for that would be to make laws. Judges are bound to take the act of parliament as the legislature have made it, *1 T. R.*, 52, *4 T. R.*, 572.

The principle hardly requires further allusion to force its clear application to the position before us, but we have it again merely referred to in the judgment delivered in *Regina vs. Justices of Shropshire*, 2 Q. B., 94.

"The legislature might have intended to give jurisdiction to county courts, borough sessions, &c., however mischievous it might be, or it might have intended to prevent the evils, but not carried its intention into effect, or the whole subject might have escaped attention. In any one of these cases we should be bound to discover what the law is and to declare it without any regard to the consequences of its imperfection." This is a new and substantive act in relation to this subject, and no other acts are on our statute book in *pari materia*, and no provisions can therefore be taken as existent regulating the form of procedure in cases of forfeiture under the act. We have further no affirmative words declaratory of the power of the justices to condemn, to declare forfeited and to direct to be sold, &c., none of the formula necessary to the attainment of the proposed end, and the legislature appear content, to declare, that the party so convicted shall be *liable* to have his vessel so seized, "forfeited and sold." Not even in the context is there anything whatever to control these words or to give them any practical effect.

We find where a legislature intended to confer the powers here contended for, full particularity is observed in the statutable provisions imposing penalties and creating forfeitures.

Reference may be made to the Customs' Management Act, title 14, c. 49, p. 278, 79 of the consolidated statutes. Whereby it is provided that all penalties and forfeitures incurred, &c, &c, shall be sued for and recovered in the supreme court or court of vice admiralty of this island. * * * In like manner the same particularity is found in the provisions of 43 Vic., cap. 9. The local act respecting wreck and salvage—and also in the enforcement of the provisions of our license laws regulating the sale of Spirituous Liquors, 47 Vic., cap. 9, sec. 28, &c., proper minuteness and precision are observed in the language conferring powers on peace officers in the discovery, seizure, mode of procedure and sale of liquors discovered by them in the execution of their duties under these statutes.

Under the Merchants' Shipping Act, (Imperial, 1875), all cases of forfeiture are separately and specifically dealt with as will be seen on reference to sections 253, 254, &c., of the act. In the consolidated statutes of the Dominion of Canada, vol. 1, c. 94, providing for the protection of the coast fisheries, vessels, boats, &c., seized and subject to forfeiture thereby, are to be dealt with and proceeded against in a mode and manner prescribed, and the application of the proceeds of the sale of such property is duly provided for.

in such acts as the 8 & 9 Vic., c. 88, (Imperial), for the regulation of British shipping and navigation, the regular fines are determined and fixed for suing for penalties, and for disposing of or restoring forfeitures. The same principle will be observed to exist in the 25th section of the act, 1845, for registration of British vessels. It will be seen that the legislature during last session, embodied in giving effect to the provisions of the Treaty of Washington, 1888, certain clauses or sections in relation to fines and penalties necessarily clear and specific. The 11th section, in other directions, provides that every suit, action, or proceeding for the recovery of any such penalty or the enforcement of any such forfeiture, shall be tried or heard by the court or the court of vice admiralty, at the place where the vessel or vessel is detained, &c., &c.; and by the 12th section, judgments involving forfeiture shall be reviewed by the Privy Council before the same are carried into effect. It will be seen, in all such cases, the machinery of the law is provided for the satisfactory execution and fulfilment of the objects intended to be accomplished by the legislature; but the omission is remarkable for the absence of such indispensable provisions as to accomplish its intended work.

A forfeiture is not in the nature of a satisfaction to a claimant, but a punishment of the offender, as in this case, a criminal proceeding. The statute, therefore, must be strictly construed. The language of the act being so doubtful and its effect insufficient, the interpretation must be in favour of the Crown and against the creation of any such new jurisdiction that contended for on the part of the Crown. We find no reference to the application of the principle in the judgment of *C. J. Kenyon*, in the case of *Cater vs. Knight, Durd. and*

In general the jurisdiction of the superior courts is ousted but by express words and where no particular point is pointed out by which a penalty is to be recovered, the remedy must be by action in the superior court."

Whether this forfeiture could be enforced under a provision in rem in the admiralty, or by any other proceeding in the superior court, it is unnecessary to discuss.

It is sufficient to find, and it is clearly obvious from the language of the statute and the authorities and other references, that such authority, jurisdiction or power has been conferred on a magistrate, or can be inferred, to enable him to adjudicate on the vessels seized under the circumstances set out

on this record; and therefore the judgment appealed from must be set aside so far as it relates to such forfeiture, and in other respects it must be affirmed

Mr. Greene, Q. C., for the Crown.

Sir W. V. Whiteway, Q. C., and Mr. Scott, for the defendants.

GORDON v. GORDON.

1889, January. HON. MR. JUSTICE LITTLE.

Trespass—Title—Uninterrupted occupation for twenty years.

The plaintiff's husband had thirty years previous to 1889 caused erections to be made on a property situate at Labrador, and carried on business there from 1857 to 1877. That after the death of her husband, plaintiff leased the property to different parties. That in 1833 the defendant committed a trespass by taking possession of the property and holding it to date of action. The defence set up was an uninterrupted possession and occupation of the property, prior to the occupation of plaintiff's husband, for over twenty years, and since then that plaintiff's husband and other occupiers were tenants of the defendant. Considerable conflict of testimony appeared. In giving judgment for the defendant, the court

Held—That a stay of execution would be granted till some arrangement could be arrived at as regards compensation for the erections placed on the property by the plaintiff, on the grounds that defendant was at fault in not having an agreement for such valuable property reduced to writing.

In this action the parties (Julia Gordon, administratrix of the estate of the late Samuel Gordon, and Teresa Gordon and Benjamin Parsons) dispensed with the services of a special jury drawn for the trial of the cause, and agreed to submit it to the hearing and decision of the court.

The action, though nominally one for an alleged trespass, involved the question of title to a valuable fishing-room and property situate at Deer Island, Chimney Tickle, Labrador.

The plaintiff is the widow of the late Samuel Gordon, one of the sons of the person named as the original holder of the fishing rights attached to the then possession of the *locus in quo*.

From the evidence of the plaintiff it appeared that plaintiff's husband (the late Samuel Gordon) about thirty years ago prosecuted the fishery from Deer Island, and subsequently built up stages and other erections on the western part of it; that his operations were of a very extensive character, and that he

expended a large amount of money in the erection of the stores, dwelling-house, stages and wharf, now on the premises; that for fully thirty years her deceased husband carried on a "general planting business" in the fisheries on the Labrador, and had during that time John Munn & Co. as his supplying merchants; that from 1857 or 1858 he continued uninterruptedly to hold the place, land and room in question, for the purposes of the fishery and his trade and business up to the year of his death, which occurred in 1877. He was succeeded by his son Archibald, a stepson of the plaintiff, in the possession of the *locus in quo*, and in the carrying on of the fishery; that Archibald died in May, 1878. On his death the supplying merchant sent an agent down to Deer Island to conduct the summer's fishery for the benefit of the plaintiff.

During the lifetime of the late Samuel Gordon and his son Archibald, the late George Gordon (defendant's husband) never, to the plaintiff's knowledge, claimed the land or place in question, nor was she aware that it was held by her husband otherwise than as absolute owner thereof; that said George Gordon was the eldest of the children of the said late Samuel Gordon, sr., and survived plaintiff's said late husband Samuel about two or three years. It further appeared in plaintiff's evidence that George Gordon first claimed the premises in dispute from the plaintiff after the death of said Archibald. In 1879 one Anderson hired the place, as stated by plaintiff, from her, and paid as rent ten pounds per year therefor, which was credited to her in account at Messrs. Munn's, and so continued to hold the place up to 1883; that defendant Parsons at one time applied to her to rent the place, but subsequently leased it from the other defendant, and that he now occupies the place under this lease.

This statement of the plaintiff contains the gist of the grounds on which she relied, and in support of it witnesses were examined. The first of these was Robert S. Munn, managing partner of the firm of John Munn & Co. His evidence mainly tended to corroborate the preceding statements.

* * * * *

The defence relied on against the claim of the plaintiff, under these circumstances, was comprised in the assertion of an uninterrupted occupation of the property by Geo. Gordon for over 20 years prior to Samuel's occupation, and by Samuel, as tenant to George, down to his death, and subsequently by other parties

as tenants up to the present proceedings. And in support of their position the defendant's ten witnesses were examined.

The first of these was the defendant, Teresa Gordon, who deposed that her husband, George Gordon, died nine years ago; that he had for fifteen years prior thereto discontinued going to Labrador; that she is now 75 years old, and had accompanied her husband for 20 years to the Labrador, where at Deer Island, he, during that time, prosecuted the fisheries; that his father, Samuel Gordon, who died 50 years ago, carried on the fishery at and from Deer Island; that on the death of Samuel, sr., George, his eldest son, paid off an indebtedness of his father to his supplying merchants, Pack, Goss and Friar, then of Carbonear, and remaining thenceforth, in possession of the family property at Mosquito, and now occupied by defendant; that George immediately thereafter carried on the fishery from Deer Island and erected buildings and stages on both sides of the land now in dispute, and continued to use and occupy these rooms up to 1859, when Samuel, jr., went into the occupancy of the western room and paid his brother George a rent therefor yearly, not in cash, but in kind or goods, such as provisions, at the rate of ten pounds for the first year and twenty pounds thereafter. After her husband had, from illness, discontinued going to Labrador, her sons continued using the eastern room. In 1879, after Samuel's death, she received rent for the western premises from Anderson and from one other person; she received no rent from the plaintiff or from Archibald Gordon after Samuel's death; she leased the place subsequently to the defendant, Parsons, and received rent therefor from him, and he holds the place for the past four years under that lease.

* * * * *

William Tapp deposed that he was a brother in law of Sam'l, jr., and George, and that on one occasion, in his shop, he and Charles Pike being present, the late Samuel Gordon entered into an agreement with George Gordon to hire the fishing premises in question from the latter for ten pounds for the first year, and twenty pounds a year thereafter, not naming any term of years. This was about thirty years ago; at the time Samuel wasn't in possession of the place, but went there in the subsequent year, and so continued prosecuting the fishery therefrom up to the time of his death. The Charles Pike spoken of now resides in Bonavista Bay. Witness saw the defendant receive rent for this place from Anderson, who occupied it after Samuel's death.

In the foregoing evidence it was found that considerable discrepancy existed in statements of dates of occurrences of events of importance in the history of the respective claims set up, but these differences will not be found to affect or alter the order of events fixing the position of the parties towards each other and in their relation to the property in dispute.

In tracing the original occupancy of the Deer Island property, it appears that a document bearing date of September, 1808, was obtained by one Samuel Gordon from R. Henry Muddle, captain of his Majesty's ship *Speedy*, and D. Buchan, lieutenant of his Majesty's ship *Adonis*, and surrogate. This document is countersigned and approved by T. Holloway, the then Governor of this Colony. By it foreigners and others are warned from interfering with Gordon in the fisheries prosecuted by him from that island. This is subsequently confirmed by another document bearing date the 22nd May, 1822, and recites that Samuel Gordon had carried on a fishery for twenty years at Deer Island, and "warns all persons not to interfere with or interrupt in any way the fishery of said Samuel Gordon, provided he arrives on the spot in a reasonable time for commencing his fishery, &c., &c."

These documents were not in evidence, nor relied on as an element of proof of title or claim by either party, but were merely used in tracing the history of the disputed property.

No real question of law appears to be involved in the determination of these opposing claims; the whole matter, therefore, rests on the weight of testimony given in support of the respective positions assumed by the litigants. Before briefly referring to that testimony, it is important to again observe that beyond the mere claim for damages for a trespass is the paramount claim for the possession of the property and the removal of the defendant therefrom. The plaintiff must therefore rely on the strength of her own title and assume the burthen of proof in order to secure a judgment in her favor. In all such cases great difficulty naturally arises in endeavouring to arrive at a satisfactory solution of claims so long standing over, particularly when, as in this instance, the evidence mainly rests on the accuracy, or otherwise, of the statements of witnesses who speak from memory of conversations and events occurring twenty or thirty years ago, and having at the time no marked interest or importance to them.

The difficulty, however, has to be dealt with, and from a careful analysis of the evidence such material facts must be ascer-

tained as may safely lead one to form a just determination on the issue raised on the record and on the merits of the respective claims.

Returning to the claim of the plaintiff, which counsel vigorously contended had been sufficiently established by the evidence, we find that in the year 1858 or 1859 her late husband entered into the possession of this property at Deer Island; that he continued uninterruptedly to occupy and use it for fishing purposes and the carrying on of his trade and business up to the time of his death in 1877; that such possession was continued for one year further by the son Archibald, and on his death, in the exercise of the same right and title, the plaintiff retained possession, through the occupancy of her tenant Anderson, down to the year 1883.

At this time, it would appear, the defendant committed the alleged trespass by taking possession of the premises, and has up to the present continued in the occupancy thereof. Samuel Gordon, the younger, had been in the occupancy of this place some thirteen or fourteen years before his intermarriage with the plaintiff, and she may not therefore be in a position to speak of her own knowledge of matters occurring in connection with the property prior to her marriage. Still, it may be considered as remarkable, that during the six or seven years of their married life she heard nothing of this claim, and that, in like manner, her witnesses were not aware of its existence. There would be clearly established, from the evidence, a title by occupancy, in the plaintiff, in her representative character, acquired by and through the eighteen or nineteen years of uninterrupted possession of the place by her late husband, and the five or six years by Archibald, on her behalf, and by her tenant. There is also advanced a reasonable inference that may be drawn from such evidence in support of the proposition of absolute title by occupancy. It is asked, would Samuel have placed such valuable erections on the land if he had the place on hire or held under such a precarious tenure as that set up on the defence?

And that the silence of those preceding the defendant, whilst such permanent and expensive buildings were being erected, should also be regarded as negating the existence of any hiring on such an agreement as that set up.

However, turning again to the other side, we are met with the positive assertion of a claim of occupancy and user of both sides of the Deer Island property by George Gordon from the

time of the death of his father, fifty years ago, up to the alleged hiring of one side of the island or the land in question, to Sam'l, and subsequently thereto, the continued occupancy of the other side by George and his sons and others, under or with him. George's entry on all of the property owned by his father may have been, as stated in evidence, by reason of his having paid off the claims held by Pack, Goss and Friar, against the father; but as to the claim said to have been advanced by him as the eldest son, there could, as a matter of course, be nothing in that, as all the children in cases of the father's intestacy, were equally entitled to share in his estate.

In this action neither party appears to claim through any rights Gordon, sr., may have had to the Deer Island property.

When George became physically unable to prosecute the fishery, his son continued there on the east side, and Samuel occupied the western room. Now this entry and occupation on the part of the latter is alleged to be under and by virtue of an agreement or understanding entered into between the brothers for the payment of an annual amount by way of rent by Samuel. It is obvious that if Samuel entered into possession, subject to any such condition, and that he continued to recognize the relationship thus created, his holding or occupation would not be adverse to that of George's claim, and would not confer on the present plaintiff the absolute right to the property which she asserts in this action.

We have nothing whatever on the one side about this agreement or understanding, or about a claim for, or payment of rent, beyond Mr. Munn's statement of rent being paid by Anderson to the defendant. Whereas, on the other side, we have the positive swearing of the defendant herself, and equally positive evidence of Wm. Tapp, of the particulars of that arrangement. We have Davis' statement that he had paid rent for this place to George Gordon, and that subsequently Samuel informed him he was going to hire it from George; that some time after Sam'l had taken possession he knew him to have paid the rent.

Then, during Anderson's five or six years occupation, it is abundantly shown that he paid the defendant rent therefor; and lastly, we find the defendant and her son, after the place was vacated by Anderson, taking possession and leasing the property to the co-defendant, Parsons.

Under such circumstances it must be clearly apparent that the weight of evidence is against the plaintiff, and I am constrained to decide against her claim in this action; but in view

of the uncertainty in the statement of the terms under which the property was to be held, their being an absence of any mention of the length of time or number of years it was so to be held by Samuel, it would be manifestly inequitable that he or those in succession to him should be turned out of possession at the caprice of the other party without entering into some arrangement as to the buildings and other erections placed on property by Samuel and those claiming under him.

The rent being all paid up and that claim satisfied, an immediate removal or ejection, without previous notice, would also mean the confiscation of the buildings and improvements that might have been so erected and remained on the property up to the time of the entry. Both parties were equally at fault in not having the terms of their agreement relating to such valuable property defined and reduced to writing. Probably, as between brothers, such particularity may not have been regarded as requisite; but we have here the consequence of such neglect, and it is right that no unfair advantage be permitted to be exercised by one over the other under the circumstances.

To save further litigation and costs, I consider the parties should arrive at some understanding as to compensation for the buildings on the place or for their removal; and to afford time to enable them to do so, I shall order the stay of execution on the judgment to be entered herein in favor of defendants.

Mr. Emerson and Mr. Wood for plaintiff.

Mr. Scott for defendants.

NEWFOUNDLAND RAILWAY CO., ET AL 401
v. GOVERNMENT OF NFLD.

1889, January. BY THE COURT.

Practice—Contract—Counter-claim—Time allowed to prosecute—Rule to dismiss or strike out.

The Newfoundland Railway Company had succeeded in an action against the Newfoundland Government in obtaining a judgment for annual subsidies and grants of land attaching to each five-mile section of road completed. On appeal to Privy Council, the Government was adjudged the right to counter-claim for damages for breach of contract. The Government proceeded to take evidence to substantiate their counter-claim. Meanwhile the annual subsidies were tied up, pending the judgment on the counter-claim. The Company moved that, as a reasonable time had been allowed to the Government to establish their counter-claim, and they having failed to bring it forward, that it be stricken out.

Held—That all arrears of subsidy be paid, and all that may accrue till final adjudication, and that the motion to strike out counter-claim be disallowed.

THIS matter comes before us at this time in the form of a motion to dismiss or strike out the counter-claim in the first suit, and for leave to take the petition *pro confesso* in the second suit. The limit given last July to the defendant Government to be prepared for adjudication was the 8th instant.

Commissions to take evidence in various quarters have since been issued on the part of the defendants, but little progress has been made with any of them, and the attorney general has filed an elaborate affidavit to account for the delays and want of progress, and to justify further extension of time for getting up the defence.

The defendant Government appears also to have discovered that a survey of the country over which the projected line of railway has not been built, is a necessary preliminary to obtaining accurate and sufficient evidence to sustain the counter-claim set up by it, as an answer to the payment of the subsidies due upon the completed portion of the line.

The attorney general takes the position that an appeal to the legislature for authority and approval will be necessary, before undertaking the cost of such a certainly expensive means of obtaining proof, in aid of an uncertain and speculative claim.

Under such circumstances the court would not be justified in longer tying up any part of the subsidies which have accrued due, and the arrears upon which now amount to \$67,500 with interest at five per cent. At the same time, we do not see what good purpose can be served by at present striking out

the counter-claim, with these commissions to take evidence granted and outstanding, and some evidence already taken, in view of possible proceedings *de novo*, in which the defendants would become plaintiffs. The better course is to allow the counter-claim to stand upon the pleadings and be followed to final adjudication.

In this view therefore, we recommend that the arrears of subsidies be paid, with interest at five per cent.; that the Attorney general undertake that such others as may accrue due before the final adjudication shall be paid; that the motion to strike out the counter-claim be disallowed, and that any future motion for promoting the hearing of the cause shall take the form of one for publication of evidence, to be made at the discretion of either party.

This suggestion having been accepted by both parties, as the most prudent and satisfactory mode of dealing with the cause in its present stage, let a rule go accordingly, and let the plaintiffs have their costs of this proceeding.

Mr. Kent, Q. C., for plaintiffs.

Attorney General (Sir James S. Winter), Mr. McNeily, Q. C., and *Mr. Emerson*, for defendants.

QUEEN v. PARNELL

1889, *February*. BY THE COURT.

Practice—Murder—Trial—Motion for postponement.

During a special term of the Supreme Court holden for special business a true bill was found against the accused. Upon application for postponement of trial on several grounds, the court

Held—That it being a special term was sufficient to concede to the motion for postponement. Want of time to prepare defence, absence of witnesses, and illness of accused, are good grounds why the Crown should not force accused to trial.

In this case the accused has been indicted only within the present week for the wilful murder of Archibald Sillars. The taking of the deposition upon which the accused was committed for trial, appears to have occupied from the 30th November to the 9th of January. This is a special term, out of the ordinary

course. There would, under ordinary circumstances, have been no sitting of this court for the trial of criminal cases until May next. Counsel for the accused apply for postponement of the trial over the term, upon the grounds that there has been no sufficient time for receiving instructions and preparing for the defence; that public feeling is just now much excited; that the state of health of the accused is such that neither physically nor mentally is he in a fit condition to prepare his defence and instruct his counsel; and that it is improbable that he would, just now, be able to undergo a lengthy trial as this is certain to be; and that a material witness for the defence is now absent, and is believed to be in the United States.

We take the Attorney general in reply to admit that it is difficult to resist this application if the statements be true, but that they are very indefinitely put. Moreover, the Attorney general, in a very temperate and becoming spirit, avows that there is no desire upon the part of the Crown to force the accused to a trial for which it may be reasonably believed he is unprepared, or which he may just now be unfit to bear; and, he observes, that in the interest of public justice it would be unwise to enter upon a prosecution during which the prisoner might, from his impaired state of health, break down.

We think that in face of the fact that this is a special and unusual term, it would be sufficient, in the absence at least of serious prejudice to the prosecution, that this motion should be made to be conceded; but in view of some of the circumstances, an ample case has been made out for present postponement, but for what length of time we now offer no opinion.

In acceding to this application, we desire it to be understood that the allegation of excited public feeling is one to which we would not be disposed to yield, as we cannot believe it exists to the extent of prejudicing the fair trial of the accused.

A reason which must under any circumstances have weighed with the court is the short remainder of the present term, which is probably quite inadequate for the purposes of the lengthy trial which the voluminous depositions alone seem to predict.

Let the trial of this case be postponed until the next jury term of this court.

Attorney General (Sir J. S. Winter) and Mr. G. H. Emerson for the Crown.

Mr. R. McNeily, with Mr. Kent, Q. C., and Mr. A. W. McNeily, Q. C., for accused.

1889, February. LITTLE, J.; PINSENT, J.

Practice—New Trial—Landlord and Tenant—Covenant for renewal where there is a condition precedent—Holding over—Increased Rent.

A lease of a house was granted in 1847 for a term of 40 years. In 1859, an extension of ten years was granted, in consideration of the lessee erecting substantial stores in the rear of house leased. At the end of the 40 years the lessor gave notice of an increased rent, regarding the lease then as terminated, on the grounds that the stores had not been erected.

Held—That the performance of the covenant, to build was a condition precedent to the lessees having a renewal. The covenant was not a demise, in *presenti*. Having had notice of the increased rent the lessee must be held to have acquiesced with the new proposal and was bound to pay the increased rent.

THE proceedings in this cause were initiated by a writ of summons being issued in the name of the plaintiff, John D. Flood, against the defendant, to recover the sum of twelve hundred dollars, being, as appears by the bill of particulars, for one and a half year's rent of certain land on the south side of water street. The declaration contained the common counts in assumpsit for money payable for the use of this message of land, and the defendant met this claim at first by the plea of general issue only. This was the state of the record when the cause was about to be submitted to trial before a special jury, when on motion of defendant's counsel, he was permitted to file additional pleas. Under the first of these an amount of \$311.55 was paid into court, sufficient, as alleged to satisfy plaintiff's claim; and the second plea, upon equitable grounds, set out, that by an indenture of lease, dated the 30th of March, 1847, the then legal representative of John Flood, plaintiff's father, demised and leased to Samuel Knight the land and premises in question, for a term of forty years from the first of May, 1847, at a rent of £45 stg. per annum, and that on the 27th August, 1859, the plaintiff in this action and one Wm G. Flood, being the owners of the land, in consideration of the lessee erecting substantial stores of brick or stones in the rear of the dwelling-house built by him on the said land, they agreed to extend the term of the said lease for ten years further. The plea further set out in substance, that in accordance with the terms of this memorandum of agreement, the lessee did erect substantial stores of brick upon the said land in rear of the dwelling-house; but that the plaintiff, in fraud of the agreement, refused such extension, and notified defendant that he would claim rent from him at the rate of \$800 per annum from the first of May, 1887,

being the termination of the said original term. The defendant averred his willingness to continue to pay the rent at the rate reserved by the lease for the extended term, and claimed to be entitled to have from the plaintiff a specific performance of the said agreement for the extension of the term so granted.

The plaintiff denied the sufficiency of the amount so paid into court, to meet his claim, and alleged that there had not been a fulfilment of the conditions of the agreement to entitle the defendant to the extension claimed.

Under this new aspect of the cause presented by the pleadings as amended, widely different issues were raised than appeared on the record when the case was called for trial. In view, then, of this changed position of the pleadings, and the probability of the present action, if persisted in as it stood, failing in satisfactorily terminating the contentions substantially in dispute,—counsel assented to have submitted to the consideration and decision of the jury the question of the sufficiency of the stores so erected by the lessee in fulfilment of the condition on which the extension of the term was alleged to have been granted. It being also arranged and agreed on that a rule would be granted defendant embodying the grounds to be relied on in a motion for a non-suit, so that the legal and equitable claims advanced by the parties might be submitted on argument for the final judgment of the court, and the present claim for rent should remain in abeyance until such judgment should be pronounced.

The parties thereupon proceeded with their evidence in support of their respective contentions on this single issue, and the jury having heard it and viewed and carefully inspected the structures so erected, found their verdict in favour of the plaintiff, and “that the buildings were not substantial brick or stone according to the terms of the memorandum on the lease.”

Subsequently the defendant took out his rule of the following purport:—“That judgment of non-suit be entered herein or that judgment be entered for the defendant on the grounds, first, that the further term or extension of ten years granted by the memorandum endorsed on the lease became vested in the lessee immediately upon the execution thereof; second, that under the equitable plea and the evidence the defendant would be entitled to an injunction to restrain the plaintiff from proceeding, and to the specific performance of agreement so set forth in the memorandum, &c. &c. The grounds of this rule were very fully treated and particularly gone into on the lengthy and searching argument had thereon before the court.

After having carefully reviewed the authorities and considered the arguments relied on by counsel, it is apparent that the decision sought for at the hands of the court must be based on a construction to be applied to the agreement or memorandum of the lessors, and on the statements in evidence developed at the trial and these set out on the pleadings.

As stated, the memorandum bears date the 27th of August, 1859, and is only executed by the deceased William Flood for himself and the present plaintiff, but being endorsed on the lessee's side, or part of the lease, it has remained in his possession up to the present. It was stated in evidence that the plaintiff up to 1879 was not aware of the existence of this memorandum so drawn and executed by his late brother.

It may be observed that in the original lease there is a provision, as set out in the plea, for building a dwelling-house by the lessee on the demised land; the lease also contains the usual covenants, and provides for the right of re-entry of the lessor on breach of any covenant by the lessee.

All of the conditions and covenants of this original lease appear to have been fulfilled, and no question or dispute arose between the parties until 1879, when it would appear from the testimony of Mr. Dryer, the agent and attorney for the plaintiff, an application was made by the lessor for an extension of the term of years under the old lease. The lessee, when in England, where the lessor resides, personally negotiated with him for the extension, but without success, because, as it is now stated in evidence, of the lessee's failure to erect stores in compliance with the conditions on which the extension was said to have been promised.

On turning then to the basis on which these conflicting claims are supposed to rest, we find on this agreement the intentions of the parties thus plainly expressed, that in consideration of the within named lessee erecting substantial stores of brick or stone * * * we agree to extend the within term for ten years, &c., &c.

This, as observed, was endorsed on the original lease, and as contended for by counsel, should form part thereof and be incorporated therewith.

Now, what meaning are we to attach to these words in order to gather therefrom the intention of the parties. Do these words, "In consideration of the lessee erecting," &c., sustain the view or interpretation advanced by the plaintiff, and are they to be taken as imposing a condition precedent on the lessee

before entitling him to the right to claim the concession to be made by the lessor, namely, the enjoyment of the ten years here referred to as the extended term, or is the language or words alike open to the construction sought to be imposed on them by the defendant that the agreement operates as a present demise, vesting the term at that instant in him and leaving it optional with him to build the store at any time during the currency of the term. I fear the plain grammatical construction of the words and natural meaning to be placed on such language must lead one to adopt the interpretation relied upon by the plaintiff, that the building being erected, the lessee would be entitled to the term. The words do not point to the act as subsequently following on the vesting, but to the consideration being performed, thereupon the lessee would become entitled to have the benefit of the extension: but the position of the parties in this particular is measurably determined and placed beyond speculation or doubt by the equitable plea wherein it is avowedly contended that there was a full and sufficient compliance with the agreement, and the consideration had been made good; in effect that the lessee had erected the stores agreed on and that his covenant was complied with. Thus, it would follow, whether it were a condition precedent or subsequent was now of no importance, as the act resulted in a full compliance as called for by the agreement.

But further contention on the point and on this first ground of the rule appear to be met, as already stated, by the finding of the jury. The proposition of the defendant or his claim in this particular does not appear to have been made sufficiently clear to the minds of the jury, who under the evidence found that this condition has not been fulfilled. It then results that if the terms of the memorandum be viewed in the light contended for by the defendant and be incorporated with the terms of the original lease, there would be such a breach of covenant as would work a forfeiture of the term and warrant the plaintiff in availing of his right of re-entry under the stipulations contained in his lease. But the defendant under his plea claims that here there is no such forfeiture; that he may yet make good the erection and be entitled to demand and to have from plaintiff a specific performance of that agreement.

Whilst we fully appreciate the expression that the law abhors a forfeiture we must not forget that the legal rights of parties are all we have to deal with. The facts being ascertained we have merely to apply these principles of law and decisions laid down for our guidance under such circumstances.

From the many authorities aptly cited by counsel we find in the case of *Rankin vs. Lay*, 6 b. jurist, p. 685, it is stated, *inter alia*, in the judgment of the Lord Chancellor: "If there has been a breach of the agreement, and if there has been what would have amounted to a breach of the covenants which ought to have been introduced into the lease had it been granted, which would have worked a forfeiture, and that is clearly made out, then that is an answer to the bill, and specific performance should not be decreed." And in *Saunders vs. Pope*, 11 *re*. 282, we find further reference made to the subject of such relief in the following terms: "The distinction has been taken that relief may be had against the breach of a covenant to pay money at a given day, but not where anything else is to be done. In such cases the law having ascertained the conduct and the rights of the contracting parties, a court of equity ought not to interfere." In *Woodfalls, L. & T.*, at p. 303, it is succinctly stated that, "The result of the modern cases appears to be that accident and surprise afford the only instances in which relief will be given, and that, the fact that a landlord gains ever so large an improved value by insisting on the forfeiture is not to be taken into account." The same principle may be found in *Job vs. Banister*, 2 *Kay & J.*, 374, and also given in foot note p. 468, *Fry on Specific Performance*.

In this last case there was a lease for 21 years, renewable on the written request of the lessee for 21 years additional, and so on from time to time the renewal was to be made, provided the houses on the land were kept in repair, &c.; there were the usual covenants to keep in repair, &c., and the right of re-entry. The lessee expended large sums of money in building houses on the land; some months before the expiry of the second term of 21 years the lessee gave notice that he would require a renewal. At that time one of the houses was much out of repair, and the lessee allowed it to remain so as it was doubtful whether a new lease would be granted because of a breach of the covenant to insure; held that the condition precedent for a renewal was twofold, a request in writing and a compliance with the covenants; that the court could not grant an injunction to the lessee to restrain the lessor from recovering in ejectment, because of the lessee's breaches of contract in not repairing within a reasonable time.

In *Gregory v. Wilson*, 9 *Ha.*, 683, the court held that, as the breaches of the covenant were not attributable to mistake or accident, and were persisted in, they were wilful and obsti-

nate, and the bill for relief in equity was dismissed. Reference might also be made to *Doe-dem Mouston vs. Gladwin*, 6, 2 B., p. 900, and *Thompson vs. Guyon*, 5 Lim., 65; *Parker vs. Taswell*, 2 DeG. & J., 559, and also to the case of *Williams vs. Jones*, 36 W. R., p. 573. It is scarcely necessary to accumulate references on the principle recognized as ruling in all such cases of breach of covenant. The foregoing show the general drift of the current of authority, and we find that even under the decisions in equity, although great hardships may in many cases apparently exist, still contracts deliberately entered into must be sustained, and the obligations arising thereon must be observed and enforced in the absence of any colour of fraud or unfair dealing between party and party.

We find in this instance, and from the surrounding circumstances, that the lessee was well aware of the position he held under this agreement, and assumed to himself the right of determining the character of the fabrics he was obliged to erect on the land so held by him, and did actually put up these stores before the commencement of the extended term, and maintained down to the trial that they were of the character agreed on. It has been found, not by a judge in equity, but by a special jury, who might under the circumstances have exercised their judgment, freed from any hard and fast lines of precedents or rules, in support of his contention, if the evidence had afforded them any just ground for doing so. The breach of the agreement so found is obviously not attributable to mistake or accident, and has been obstinately persisted in down to the present on the part of the defence.

Reference has been made to the statement given in evidence of the effort made in or about the year 1879 to obtain an extension of the term; both parties would, therefore, appear to have been aware of their respective positions, and instead of adopting measures at that time for the termination of the dispute, they allowed it to drift along into the present proceedings. It was then known what objections existed and nothing appears to have been done. But for that testimony it would otherwise appear that the lessors had acquiesced in what was done by defendant as a compliance with his obligation under the agreement. It is now clear and beyond question that there has been a serious failure by the lessee to comply with his agreement, amounting to a breach of covenant, and which, under the terms of his original lease, would work a forfeiture. In my opinion, the condition annexed to the extension of the

term as agreed on, must be regarded as a condition precedent to the vesting of that term; that the very substance in point of time of the agreement was the erection of the stores as stipulated for by the parties. I also consider that the finding of the jury completely dissipates defendant's claim to having fulfilled that condition, and there being such a breach of his obligations he consequently has disentitled himself to the consideration sought for and to the order for specific performance asked from this court.

HON. MR. JUSTICE PINSENT:

This is an action for the recovery of \$1,200 for three half year's rent of premises on the south side of Water street.

The defendant pleaded "never indebted," and afterwards paid into court \$311.55 as sufficient to satisfy the plaintiff's claim; and with regard to the difference between that sum and the amount sought to be recovered he pleaded equitably, that the deceased, Samuel Knight, held a lease from the plaintiff for a term of forty years, commencing the first of May, A. D. 1847, at the rent of forty-five pounds, stg., per annum; that afterwards, in August, 1859. the plaintiff agreed to extend that term by ten years, in consideration of Knight's erecting substantial stores of brick or stone in the rear of the dwelling house already built, and the plea avers that Knight did erect such substantial stores, and yet the plaintiff refused to extend the term, and has wrongfully required to be paid at the rate of \$800 per annum since the expiry of the term of forty years, instead of the rent reserved by the lease.

The case was tried in the last term before Mr. Justice Little and a special jury, and after hearing the evidence and taking a view of the premises, that jury found "for the plaintiff, Flood, that the buildings are not substantial brick or stone according to memorandum on the lease."

The defendant obtained a rule *nisi* for a new trial upon points reserved and otherwise, and this rule was heard before us at the close of the last term.

The original lease is in the ordinary form of building lease, and the indorsement made upon it in 1859 is as follows: "In consideration of the within named lessee erecting substantial stores of brick or stone in the rear of the dwelling house now occupied by him and built on the land herein demised, we

hereby agree to extend the within term ten years." This was signed by the then lessors.

As the end of the original term approached, the now sole proprietor, the plaintiff, in April, 1887, gave Mr. Knight the following notice in writing: "I hereby give you formal notice that the rent of the premises situate on Water street, No. 173, now in your possession (and the lease of which will terminate on the last day of the present month of April). will be £200 cy. per annum, should you desire to occupy said premises for another year."

Notwithstanding this notice the defendant, and since his death his administrator, have continued to occupy the premises, and the defendant insists that the lessee is subject to nothing more than the original rent of £45 stg.

The defendant contends, first, that Knight fulfilled the condition which entitled him to an extended term of ten years at the old rent.

The learned judge reports that upon this point he is quite satisfied that the verdict of the jury is correct, and I have every reason to concur with him. The defendant says, secondly, that the terms of the endorsement on the lease amounted to a then present demise, and that the lessor's remedy would be upon the covenant or undertaking to build, for a breach or failure in its performance by the lessee; and he contends, moreover, that the condition upon which the extended term was to be given would be satisfied by the erection of the required buildings within any part of the extended term.

Upon the first of these positions I do not regard the endorsement upon the lease as a demise *in presenti*, but as an undertaking to grant a further term, *in futuro*, upon the fulfillment of certain named conditions which, upon their faithful performance, would constitute an executed consideration. This is the construction I should have put upon it, if it had been executed by both parties, but as a matter of fact we have no proof of anything but the unilateral undertaking of the lessor endorsed upon the lessee's counter-part of the lease.

But if we were to suppose a demise for the further term had been executed by both parties, that would have involved a covenant express or implied upon the part of the lessee, to erect, by the end at least of the first term, buildings of the character described in the endorsement, viz.: substantial buildings of brick and stone.

It is a well established principle that equity will not enforce

the performance of that which if already granted would have become liable to forfeiture, although where there is a substantial conflict of evidence as to whether a breach has been committed, the court will sometimes decree an ante-dated conveyance or lease and leave the parties to an action on the covenant.— (*Lewis vs. Bond*, 18 *Beav.*, 85; *Rankin vs. Lay Jurist*, N. S. 6, p. 685.)

In the case of *Gregory vs. Wilson*, 9, *Hare*, 683, specific performance of an agreement for a lease was refused upon the ground that there had been such defaults as to insurance and repairs as would, if the lease had been executed, have amounted to breaches of covenant on which there would have been a right to re-enter, the Vice-Chancellor remarking in the course of his judgment—

“It is true that until the legal relation is created, the stipulated remedy by re-entry can not be made available; but it is for this court to determine whether the legal relation shall be created or not, and surely the court may well refuse to create it if it is satisfied that there is such conduct as would justify the immediate dissolution of it, if it were created.”

Croft vs. Goldsmid, 24 *Beav.*, 312, in which specific performance was refused to a builder who had failed to complete within the specified time buildings which had been put up by him, and upon which he had expended large sums of money, and *Finch vs. Underwood*, L. R., 2 *Ch. Div* 310, in which there had been a breach, but not a serious one, of the covenant to repair, are cases in point, of much greater hardship with regard to the lessee than that upon which we are now passing judgment.

In *Bastin vs. Bidwell*, a later case from L. R., 8 *Ch* p 238, a lease of a house contained covenants by the lessee for payment of rent, for keeping in repair and painting the premises at fixed periods, and there was a covenant upon the part of the lessor that the lessee should be entitled, on giving six months' notice, before the end of the term, to have a further lease of 21 years “upon paying the rent and performing and observing the covenants” in his lease, the plaintiff was found not to have completed the requisite painting and repairs by the time of the expiry of the six months' notice, and the court held that the plaintiff was not entitled to the renewal.

These and numerous other authorities conclusively demonstrate that if the verdict of the jury in this action was (as it appears to have been) fully sustained by the evidence, the defendant has failed both in law and in equity in making out a case

for the retention of the premises upon the terms as to rent, of the old lease.

Whether under the circumstances of this case, the defendant was bound as the result of an implied agreement to pay rent to the amount of the plaintiff's claim, and as specified in his notice giving Knight the alternative of giving up possession, or of remaining in possession at the annual rent of \$800 is a point upon which I have strong doubts.

The liability of the defendant to pay rent at that rate, was not the subject of express contract on his part, and could only be the result of an implied contract. Now an implied contract is one in which the intentions of the parties to the transaction are derived from their conduct, in connection with facts and circumstances pointing to an obvious conclusion; as for instance if the owner of a chattel offers it for sale at a stated price the purchaser must be assumed to have taken it at that price, although he may himself have said nothing upon the point; and so a tenant setting up no claim of right, whose term is about to expire, and who has received a notice giving him the option of remaining at a stated increased rent, must, if he continue in possession, be taken to have assented to the landlord's terms.—*Roberts vs. Hayncard*, 3 C. & P. 432. No other conclusion could be drawn from such premises. But it is quite a different thing when the tenant holding over, insists that he does so as a matter of right, and claims *bona fide*, upon that supposition, to be entitled to continue in possession at another rate of rental. No implication could in a such a case possibly arise that he had by his conduct assented to the payment of the rent imposed by the landlord, and the question of the extent of the tenant's liability would remain an open question. It would be a question for the jury whether the defendant had set up a *bona fide* claim of right, and if he had but had failed to sustain it to say what would be a reasonable amount of rent sufficient to indemnify the landlord. That amount might be the sum specified by the landlord, but to my mind would not necessarily be that sum. For somewhat analogous reasons a tenant holding over under a *bona fide* although erroneous claim of title or right, is held not to come within the statute which imposes upon a tenant wilfully holding over, after demand and notice in writing, the liability to pay the double yearly value of the premises. (*See Hirst vs. Horn*, 6 M. & W. 395, *Page vs. Moore*, 15 Q. & B., 684).

In the present case, I observe that there has been no verdict or finding of the jury upon the amount of rent, but I under-

stand from the learned judge who tried the case, that there was no dispute upon that point, and if that is so, it may be assumed judgment will, the other issues being found for the plaintiff, be entered for the full amount claimed. If not, the amount must be assessed.

Mr. Kent, Q. C., for the plaintiff.

Sir J. S. Winter, Q. C., and *Mr. Morison*, for defendant.

EX PARTE COSTIGAN AND MURPHY.

1889, *August*. HON. MR. JUSTICE PINSENT, D. C. L.

Practice—Certiorari—Habeas Corpus—Master and servant—Abandonment of fishery—Masters' and Servants' Act—Application to Lobster fishery.

Fishermen under an agreement to fish from their homes, in their own boats, for lobsters during the fishing season, took up their lobster traps in the middle of the season and refused without sufficient cause to further prosecute the fishery. On a complaint, the magistrate under the "Masters' and Servants' Act" sentenced the defendants to imprisonment. On an application for a *certiorari*, and rule for a *habeas corpus*.

Held—That the statute contemplated no such relationship as that created by defendants agreement; and only such as involve the immediate personal control of employer, and the personal service and subjection of employee. The agreement is simply a contract, and does not constitute the relation of master and servant.

Held—That under the "Masters' and Servants' Act" where the servant commits a breach of his agreement and is brought before the court and is prepared to go back to his service, he is relieved from the penal consequences of imprisonment.

THIS matter came before me at Placentia on the 20th inst., upon an application for a *certiorari*, and for a rule for a *habeas corpus*, the proceedings and evidence having been returned by the magistrate, T. O'Reilly, Esq. The case came on for hearing, Mr. Emerson appearing for the parties under sentence in the gaol at Placentia, and Mr. Greene, Q. C., for the magistrate.

The employer of the men being a resident of Burin, I adjourned the adjudication until an opportunity should have been afforded him of becoming a party to the proceedings: but he

has wisely abstained from going to unnecessary trouble and expense in the matter.

It has become my duty to say whether the men shall be further detained in custody or whether they shall be discharged. I have determined that they are entitled to their discharge, and I ordered their release from the gaol at Placentia, and my reasons for that course I deem it desirable to commit to writing for publication. The following is the form of agreement under which the applicants were engaged :

"It is hereby agreed between Joseph Inkpen and Joseph Murphy that he shall fish for lobsters for the said Joseph Inkpen from the commencement of the voyage until the last of August next, or the end of the voyage. He is to fish one hundred traps, and on condition of his diligently fishing said traps, and, at the end of the voyage, delivering all rope to said factory, he is to get eighty cents per hundred delivered to the smack, of a lawful size."

On the first of August Inkpen laid a complaint before the magistrate that those men had taken up their lobster traps in July, and refused to perform their duty without sufficient cause. The magistrate issued his warrant for the apprehension of the men, under the Masters' and Servants' Act, cap. 109, con stat. It is admitted, for the purposes of this case, that the accused live in their own houses and prosecute the fishing for lobsters in their own boats.

While it is true that the language of the Masters' and Servants' Act is very wide and comprehensive, and applies to the performance of any duty "as fisherman, shoreman, shareman, sealer, or any other kind of service, whether agricultural, mechanical, or otherwise," I am of opinion that the statute contemplates and is properly applicable to an occupation and the performance of duty involving the immediate personal control of the employer and the personal service and subjection of the employed. The words of the act are wide in including almost every kind of service of that sort within its provisions, but of that kind I do not conceive the fishing for and supplying lobsters under such an agreement as that in evidence taken.

The agreement amounts simply to a contract to perform certain independent work, and to supply a given article, the result of that work, at a given price. The work is such that it may be intermittent; there may be times and seasons and circumstances when and under which the most diligent might be justifiably absent; and who is to say when diligence shall have ceased, and penal negligence shall have begun? There is

nothing in the agreement to constitute the relation of master and servant, and the words of the Act are, and are very properly, in my judgment, confined to such relation.

Such words as "his master consents to *receive him back into his service*," "absent himself from his employer's service without leave,"—the forfeiture, for absence, of "a sum equal to twice the rateable proportion of his wages,"—the penalties to which third parties are made liable "who shall harbour or employ the servant of another after notice," and so forth, attesting conclusively to the inapplicability of the statute to such a case as the present.

There is another point raised in the case, of great importance, the determination of which (as I have held that the agreement for lobster fishing does not fall within the scope of the Masters' and Servants' Act) is not essential to the present litigation. I think, however, that I ought not to be silent upon it, to the end that magistrates may know how far, and in what way, their jurisdiction may be exercised under the Act, and that the trade and legislature may take steps for the amendment of a law which is manifestly defective. The first section of the Act provides that a servant committing a breach of his agreement may be apprehended and brought before a justice, "*and in case such person shall refuse to perform such contract or agreement without shewing sufficient cause or excuse therefor*, such justice may commit such person to prison for a period not exceeding thirty days." The law has, I believe, been administered for over twenty years as if a justice were empowered to sentence the defaulter to imprisonment for the offence for which he had been apprehended and brought before him, and it is only within a few weeks, as I am informed, that one of the magistrates for St. John's, (Judge Conroy), upon the objection being taken that, under that section, if the servant consented to perform his agreement when brought before the justice, he became relieved of the penal consequences of imprisonment, upheld the objection and discharged the servant from custody. It seems clear that the Act is susceptible of that reading only, and I feel called upon to affirm the ruling as against the former (and, so far as this court is aware), unchallenged practice of so many years.

Mr. Greene, Q. C., for magistrate.

Mr. G. H. Emerson, for defendant.

1889, *April*. HON. MR. JUSTICE PINSENT.

Practice—"Companies' Incorporation Act, 1873"—*Mandamus to Company to elect Directors.*

Under the "Companies' Incorporation Act, 1873" the Newfoundland Consolidated Copper Mining Co. was incorporated. Certain bye-laws were adopted by the company, one to the effect that the annual meeting should be held in July. Disregarding this bye-law, a meeting was called in April at which the directors present were re-elected on the motion of the only shareholder present. On an application by a shareholder for a mandamus to the company to elect legally the directors,

Held—That no meeting for the election of new directors can be valid during the period for which the former directors had been elected.

THE Newfoundland Consolidated Copper Mining Company appears to have been incorporated in the year 1880 under an act of the Newfoundland legislature, viz.: "The Companies Incorporation Act of 1873."

Under this statute, by a very simple mode of proceeding, it is competent for three or more persons to form themselves into a company for the purpose of carrying on manufacturing, mining, and other businesses.

Under the third section of that act such companies are to be managed by not less than three, nor more than nine directors, "some of whom shall be residents in this island, who shall, except the first year, be annually elected by the stockholders at such place in this island or elsewhere, and at such time as shall be directed by the bye-laws of the company; and public notice of the time and place of holding such election shall be published not less than twenty days previously thereto in the *Royal Gazette* of this island, and the election shall be made by such of the stockholders as shall attend for that purpose either in person or by proxy appointed in writing."

By the 4th section it is provided that "in case it shall happen at any time that an election of directors shall not be made on the day designated by the bye-laws of the said company, when it ought to have been made, the company for that reason shall not be dissolved, but an election for directors might be held on any other day in such manner as shall be provided for by the said bye-laws; and all acts of directors shall be valid and binding as against such company until their successors shall be appointed."

By the 15th section the directors are empowered to make bye-laws not inconsistent with the laws of this colony.

By the 28th section it is provided that no note or obligation

of a shareholder, whether secured by pledge or otherwise, shall be considered as payment of any money due from him on any share held by him, and that no loan of money shall be made by any such company to any shareholder, and that the directors shall be liable if any such loan shall be made, to the extent of such loan with interest, and for all prior debts of the company.

Under the bye-laws of this company it is declared that the principal offices of the company shall be in London, and the branch office in Newfoundland; that there shall be an annual meeting of stockholders on the second Monday of July in each year at the office of the company in the city of London.

Provision is made for calling special meetings

The management is vested in seven directors, two of whom are to be residents of Newfoundland, and it is provided by article 3 of the bye-laws that these directors "shall be annually elected by ballot by such of the stockholders as shall attend the annual meeting for that purpose, either in person or by proxy appointed in writing," and that "public notice of the time and place of holding such election and of all special meetings of the stockholders shall be published, not less than twenty days previous thereto, in the *Royal Gazette*, in Newfoundland, and in one of the principal daily papers published in the city of London." It is also provided that written or printed notices of annual or special meetings shall be mailed (postage prepaid) to each stockholder at his residence, as it appears upon the books of the company.

Upon the 8th of January last the promovent, Wm. McGibbon, a stockholder in the company, by his counsel, made application to me for an order for a writ of mandamus commanding the company to "proceed to hold a meeting of the stockholders for the purpose of electing in legal form the directors of the said company according to the bye-laws of the said company and according to law."

I granted an order to shew cause returnable before this court in the sittings in February, at which counsel for the directors appeared, and asked for further time, as it had been found impossible to get the necessary information and affidavits from London. The court considered the application reasonable and postponed the hearing to the sittings in March.

In the March sittings a further postponement was desired on behalf of the directors, under the impression by their counsel that the papers had not then been forwarded by mail. We refused any further postponement as unreasonable, but it was

afterwards proved that the papers had arrived, while on the other hand notice of that fact was given too late to enable the promovent to make affidavits in reply, as he had left St. John's by the return mail packet which brought the London papers. At the hearing, however, we admitted the use of these, subject to objection, and we find that their admission at the argument has not materially affected the result of this application.

The grounds upon which Mr. McGibbon, who is the registered owner of seventeen hundred shares in the company, seeks the intervention of this court by way of mandamus, are that no legal and regular meeting for the election of directors has been held, as by the statute under which the company is incorporated, and by its bye-laws is required. He states upon affidavit that in last April he received a notice (which is produced) "that a meeting of the stockholders in the *Newfoundland Consolidated Copper Mining Company* will be held at No. 3, Lombard Street, London, England, on Wednesday the 18th of April next, at noon, for the purpose of considering the adoption of the annual report and accounts." That he had no desire to attend this meeting for the purpose expressed in the notice, but that if had so desired, and if the meeting had been expressed to be for the election of directors, it would have been impossible for him to have attended, as the notice was received by him at his place of residence, New York, only on the 8th of April. He also alleged that no notice of this meeting had been published in the *Royal Gazette* of this colony; that he (the promovent) proceeded to London in the month of July last for the special purpose of attending the meeting of stockholders for the regular annual election of directors and for other purposes connected with the affairs of the company, as provided by the bye-laws; and that on Monday the 9th of July he went to the office of the company in London to attend such meeting, when he was informed by the secretary that no such meeting would be held, and that at the meeting held in April the election of directors had been made upon the motion of the only stockholder present except the directors, and he the holder of one hundred shares.

The promovent, protesting against such proceedings as illegal and unfair, then placed the matter in the hands of his London solicitors, and a considerable correspondence took place between them and the company's solicitors to which it is unnecessary to make any further reference, beyond this that the directors declined to hold any other meeting for the election of directors.

The stock of the company consists of 60,000 shares of \$50 each,

10,000 of which shares are unissued, and 30,000 are held by trustees upon trust for the company, and the remaining 20,000 are held as follows: 6,398 by stockholders in the United States, 500 by stockholders in Newfoundland, (of which 200 are registered in the names of Sir W. V. Whiteway and the Hon. A. Harvey, the only directors resident in Newfoundland), and the remaining 13,102 shares are held by stockholders resident in England, being Matheson & Co., and members of their firm and others.

In shewing cause to the order *nisi* for the mandamus, the counsel for the company and for the directors put in the affidavit of the London directors, Messrs. Macdonald, Macandrew, Matheson, Meates and Williams. in which, admitting that they overlooked the imperative terms of the 2nd article of the bye-laws, they allege that the previous practice had not been uniform to hold the annual meeting in July, and that for convenience they held the meeting for the election of directors in 1888 as soon as the annual accounts could be closed, and with the view of obtaining the sanction of the shareholders prior to the sale of the company's production of copper to the Société des Métaux, and that no stockholder except the promovent and one other from the United States had raised any objection to the time and manner of holding the meetings. These defendants submit that the meeting of April, 1888, was valid and effectual for the purposes of election, and that in case the meeting is held to be invalid the directors who were in office prior to the date of that meeting can properly hold such office under the bye-laws until the next regular annual meeting. They annex copies of the notices and advertisements from time to time given, and produce that in the *Royal Gazette* published in March, 1888, advertising the general meeting for the 18th of April in London, shewing that the promovent was mistaken in the statement that no notice of the meeting had been published in the *Royal Gazette* of Newfoundland. Counsel supported these positions in argument, and moreover contended that the rule in this case was taken upon the company, whereas if the mandamus would lie at all, it should be directed to the stockholders.

On the other side it was argued that the company, being incorporated under the local act, it and its managers and directors were liable *in rem* and *in personam* for the due observance of the law under which the company derives its existence; that the terms of the rule providing for the annual meeting are so imperative that they must be strictly observed to enable a valid

election to be held, or at all events that no annual general meeting for election of directors could be held before the term of office of those already appointed had expired and during the currency of their year of office, and that the notices to the shareholders were insufficient, and that in any case the meeting of April, 1888, was a special one and not the annual one contemplated by the rule, and that when McGibbon required a meeting to be held for the purpose of election of directors, his request should have been complied with.

Besides these questions of law, there is a controversy between the parties upon the accounts of the company. It appears that certain mining properties and effects were purchased by the company from Francis Ellershausen upon the terms that he should have allotted to him 44,000 shares in the company, and that the company should guarantee payment of an indebtedness of his of \$250,000, he depositing 30,000 of his shares as security to the company. Ellershausen ultimately failed to pay this indebtedness, and Matheson & Co. paid it, taking a mortgage upon the company's properties and releasing the guarantee and assigning the shares in trust for the company. It is said that by this and other means and good management on the part of Matheson & Co, the company and its mining operations have been kept alive at times when a forced sale would have been attended with enormous sacrifice. The promovent contends that the company is not chargeable with this indebtedness to Matheson & Co., and that this was a matter he desired to bring before the regular annual meeting if he had been allowed the opportunity of attending one.

As we understand it, this position is put more for the purpose of fortifying the promovent's claim for the exercise of the discretion of the court in awarding the writ of mandamus, and by way of illustrating the hardship of holding irregular meetings upon insufficient notice, than in the expectation that any judgment will be passed upon the question of the propriety or legality of the charge against the shareholders.

It is plain that this objection could not be entertained in this proceeding for any other purpose, while it may be a fit subject for inquiry in another form.

That the promovent's objection to the time and manner of holding the annual meeting for the election of directors, is well founded, as matter of law and of fair dealing with the shareholders is hardly open to question. We have no hesitation in declaring that no meeting for the election of new directors can

be valid during the period for which the former directors had been elected.

Whether the court would at this period of time, even if it were within its power to give full effect to its process, exercise its discretion by way of awarding the prerogative writ of mandamus, is doubtful, as the time for holding the regular annual meeting is drawing nigh and it does not appear that any good practical purpose could be served by directing an election which could be good for a short broken period only, and which (judging from the affidavits) would not improbably result in the selection of the same persons who now fill the office, under the authority of the regular July meeting of 1877, and who, it seems, were re-elected at the special (but for this purpose, irregular) meeting of April last.

The law, as it happens, makes provision, as we have seen, to keep alive the active powers of the directors until the appointment of their successors.

The court always exercises great caution in the exercise of its discretion in granting the writ of mandamus which could only effectively for such a purpose as the present, be enforced by process against the person; it is not a proceeding as for accounting and otherwise, in which process could be served vicariously in the country, and by no means other than personal, and where effect would be given by the court to its judgments by controlling the conduct of business and sequestrating the property. Here the great majority of the stockholders, and five out of the seven directors, are resident in England; indeed all the offenders, all those who have been parties to the irregular proceedings, are outside the jurisdiction of this court, and the principal office and the place for meeting is in London.

These latter facts present, under any circumstances, insuperable objections to the court's making the rule absolute upon this application, but as this is the first instance of an application of this kind under the "Companies' Incorporation Act," and as the irregularities are such as to give the promovent abundant cause of complaint, we discharge the rule without costs; and we do not hesitate to express the hope that in the case of a company representing, as this one does, such immense property and so valuable and important an industry, the parties may discover some ready means of terminating this litigation.

Mr McNeily, Q. C., and Mr. Emerson, for the promovent.

Sir W. V. Whiteway, Q. C., and Mr. Johnson, for the comp'y.

1890, *January*. LITTLE, J.; CARTER, C. J.

Trade Mark—Registration—User of distinctive words in registered Trade Mark by other persons at time of registration—Act "Merchandise Act"—

Essential particulars.

The plaintiffs who were fish merchants applied to the Colonial Secretary to register as a trade mark in respect of fish the words "Prime Dry Codfish, St. John's, Nfld.," in circular shape with a red star in the centre, etc., and were refused. A rule was obtained calling on the Colonial Secretary to shew cause, why a *mandamus* should not issue directing the registration of same. It was contended that the only distinctive part of the trade mark was the star, and justified refusal to register the whole.

Held—That the applicants are entitled to have the descriptive words registered, but not for the purpose of giving an exclusive right or use.

On December last the applicants obtained a rule *nisi* from the court, calling on the Colonial Secretary to show cause why a *mandamus* should not issue, directing that registration be made of a certain trade mark of the applicants, mentioned and described in their application, made in pursuance of and in conformity with the provisions of the above mentioned act of our legislature.

The argument on the rule was fully heard by the court on the 19th ultimo. And from the affidavits setting out the grounds on which the application was based, and from the statements of the applicants, it appeared the applicants are members of the firm of Messrs. P. G. Tessier & L. Tessier, engaged in the general trade and business of fish in the country, and large shippers of fish to foreign and other markets. That such shipments frequently consist of fish put up in drums or packages for the Brazilian and West Indian markets. In order to distinguish their packages of fish from all others packed and shipped from Newfoundland, they used the words "Prime Dry Codfish, St. John's, Nfld.," and trade mark, well known to the trade in St. John's and at the ports to which their shipments were made. That the applicants being desirous of having this trade mark duly registered under the "Merchandise Act," application to the Colonial Secretary was made for that purpose in January, 1889. To this end they complied with all the preliminary requirements of the act, in furnishing a full statement and declaration of the facts, together with drawings and descriptions of the brand or mark. From these drawings so accompanying their application, it appeared the trade mark consisted of the words "Prime dry codfish, St. John's, N.F.L.D.," in circular shape, with a red star in the centre

of the circle, the weight of the fish marked in the upper half of the circle, the words P. & L. Tessier placed across the lower half of the circle, with the initial letter of the name of the vessel in which the package was shipped, the circle, letters and figures being all colored red. Notwithstanding their alleged compliance with the provisions of the act, they state the Colonial Secretary declined registering the same, without stating any reason or assigning any cause warranted by the terms of the said act.

At the hearing of the argument on the rule so granted, Sir J. S. Winter, Q. C., counsel for the government, stated that there was a qualified assent to register a part of this trade mark, but in the interests of the public, and by force of the rules of law, settled in adjudicated cases in England, relating to trade marks, the Colonial Secretary was justified in refusing registration to these marks as a whole. He contended the only thing that could be claimed as a distinctive trade mark was the star; they could not claim that the article sold as merchantable is different from the same article as sold by others; the application covers the whole, and the applicants would claim an exclusive property in it and every part of it. That the trade mark should be confined to what is distinctive and fancy. The whole with the exception of the star and names of the firm is in common and ordinary use, and others of the public should not be prohibited from using such words on their packages as "Prime Dry Cod-fish," &c., as they would be if this were registered.

Counsel cited from a number of authorities in support of the grounds of his argument, among others *Re Burrows, Trade Mark* 5, C. D. T. K., 353; 31 Chy. Appl. p. 349; 27 Chy. D. p. 681; 33 L. J. Chy. Du 204.

Mr. Kent, Q. C., counsel for the applicants, relied on the facts as set out in the uncontradicted affidavits furnished by him and the terms of our local act, contending at the same time that the decisions cited were not applicable as they were in reference to imperial statutable provisions not incorporated or referred to in our statute, and could not be imported into it, &c.

The application is the first of the kind made to this court under the provisions of the act in question, and it appears to me our duty is simply to ascertain whether the subject is to be governed entirely by the terms of that statute, or by principles in adjudication on analogous cases in England. Our legislation on the subject of trade marks is comparatively of recent date; the first act to which reference was made in the argument was

the 43 Vic., cap. 15; the first section purports to define the meaning of the term marks and trade marks; by other sections penalties for counterfeiting such marks, and warranties of the character of the merchandize, &c., were raised, and responsibilities were made to attach to parties whose goods or packages were so impressed, and lines of procedure laid down in relation to the mark registered under the act. This act is expressly repealed by the present one, the 51 Vic., cap. 21, under which these proceedings are had.

Turning, then, to this statute, and referring to its table of contents, we find its third section is stated to contain the meaning or definition of the expression "trade mark." From this note in the index one would reasonably expect to find in the section indicated, sufficient to solve the primal question arising in the present and similar contentions. But on perusal, its language will be found to place the words in somewhat of obscurity, and render it necessary to gather the sought for meaning in other portions of the act. The section is as follows: "The expression "trade mark" means a trade mark registered in the register of trade marks kept under the provisions of this act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state, to which the provisions of the 103rd section of the Imperial Patents, Designs and Trade Marks' Act, 1883, are, under Order in Council, for the time being applicable."

Now, it appears there is no such registry of trade marks, at present, adopted or constituted under this act, and, therefore, there is nothing to be obtained or found in the way of illustrating or definition in that assumed but non-existing depository.

Then on reference to the 103 section of the imperial act, it is found to refer solely to international and colonial arrangements, enabling the Crown to arrange with foreign states for the mutual protection of inventions, designs and trade marks, and in no way or manner refers to the nature or character of a trade mark, &c.

The section would appear to have been unintentionally imported into this part of our act, as it has no application or meaning under the caption or preamble used in the section referred to. If the framers of the act had incorporated into it the sixty-fourth section of the imperial act, then we should have the definition in the express and definitive terms following:—

For the purposes of this act, a trade mark must consist of or contain at least one of the following essential features:—"A

name of an individual or firm painted, impressed or woven in some particular manner, or a written signature, or the copy of the written signature of the individual or firm applying for registration thereof as a trade mark; or a distinctive device, mark, brand, heading, label, ticket or fancy word not in common use, &c., &c."

There are other sub-sections which might also have been intended to have been made part of our law, but notwithstanding the indexing, side notes and expressed intention of affording information of what a trade mark means, the section of our statute is thus singularly remarkable for the absence of the vital matter indicated.

If the particular language used in the imperial act and the essential elements requisite to constitute a trade mark as thereby defined, were part of the statute law under which this application is made, then obviously the rulings under the authorities cited and the principles there laid down would unquestionably govern in the determination of this matter. But I consider we are now confined to the four corners of our statute, and must ascertain whether its further provisions are sufficient to enable us to clearly and satisfactorily dispose of the subject matter of this rule.

The 20th section, indexed and margined "trade marks," contains, in my opinion, sufficient to enable us to so determine on the question raised in these proceedings.

The substance of the section is as follows:—"All marks, names, brands, &c.; or other business devices, which are adopted for use by any person in his trade, business, &c.; for the purpose of distinguishing any product or article of any description, manufactured, &c.; packed or offered for sale by him, applied in any manner whatever to such article, package, box, &c.; or other vessel, &c.; whatever containing the same, shall, &c.; be considered and known as trade marks, and may be registered for the exclusive use of such person registering the same in the manner herein provided; and thereafter such person shall have the exclusive right to use the same to designate the article manufactured or sold by him."

That language is certainly sufficiently clear in evidencing the intention of the framers, and looking back at the history of our legislation leading up to this enactment, it will be found that the first section of the repealed act, the 43 Vic., cap. 15, in its terms as clearly bears the same meaning and declares and indicates the same intention.

The applicants depose that this brand and device or trade mark, for the past 40 years has been used in the trade and business of their firm, to mark and distinguish parcels or packages containing fish sold by them, and having in the manner provided complied with the other requirements of the act, ask for its registration under this section of the act. The Colonial Secretary in exercise of a discretion reserved in sub-section 4 to section 25 the act, contends he is justified in refusing to accede to the application. This sub-section provides that the Colonial Secretary may object to register, "If the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking." Under this construction it is assumed he would be authorised in seeking *dehors* the act for these essentials constituting a trade mark, for the time being, and consequently warranted in resorting to definitions contained in imperial statutes, and in relying on adjudications and dicta of English courts thereon. However, such a line of argument will be found untenable, even if the language of the act were so obscure as to be incapable of affording the interpretation or meaning sought for. And aside from the complications resulting from the exercise of such a roving commission we find, as opposed to such a construction, no reference is made in our statute to imperial legislation on the subject other than that under the third section already referred to. Resort might be had to our own acts in *pari materia*, although repealed by the present statute, to throw light on a question of construction of a section in the latter act, because then the acts might be found explanatory of each other. See *Hardcastle on Stat.*, p. 58.

This reference has already been made, and as has been shewn, the sections of both acts in their terms, relating to the sought-for meaning, are literally and in spirit almost identical. Therefore, however desirable it may be found to enlarge or improve on our act, as indicated by the argument of counsel, without authority from the act itself, we cannot go beyond the plain and grammatical meaning its language is capable of bearing. In the words of the authorities by which we are guided under such circumstances "We cannot aid the legislature's defective phrasing of an act, we cannot add, amend, and, by construction, make up deficiencies. Acts of Parliament must neither be extended beyond their natural and proper meaning in order to supply omissions, nor strained to meet the justice of an individual case."—*Groynne vs. Burnett*, 7 Cl. & Fin., 696; *Green vs. Wood*, 7, Q. B., and *Hardcastle on Stats.*, p. 21 & 32.

And in these authorities it is also laid down that "to discover the true construction of any particular clause of a statute we must attend to the connection of the clause with other clauses, &c. If the comparison makes a certain proposition clear, the act must be construed accordingly, and ought to be so construed as to make it a consistent and harmonious whole."

We must, therefore, confine ourselves to the precise language of our statute, and if the words or terms of sub-section four be not sufficiently clear in themselves, by the rules of construction, we are obliged to have reference to the context or the 20th section, and thus aided, all difficulty is in my mind removed from determining what is meant and intended to constitute a trade mark under that statute. The meaning and sense of the words, generally speaking, by relation to the language of the preceding section can thus be fully understood and clearly explained.

We have already found that the 20th section specifically and expressly enacts that all marks, names, brands, &c. or other devices adopted by a person in his trade, &c., applied in any manner whatever to a package, &c., containing any article packed or offered for sale by him, *shall*, for the purposes of this act, be considered and known as trade marks, and may be registered, &c. The comparison and connection of the language in these sections will be found sufficiently definite and descriptive to preclude the necessity of straining at a construction unwarranted and uncalled for under the provisions of the act, and under the rules which one must be governed by in its construction.

This proposed trade mark contains a mark or brand adopted by these parties in their trade, and has been applied by them in the manner described to their packages of merchandize, and should, therefore, be considered as such trade mark, and in that case, in the words of the act, they may be registered in accordance with the provisions of the statute.

Undoubtedly the act is faulty and somewhat defective, and if it be considered desirable to bring our laws, on a subject of such growing commercial importance, in harmony with those governing in analogous cases in England, a re-casting of our statute will be found indispensable.

At the argument counsel assumed and vigorously urged, as a reason against the rule being made absolute, the injustice that would result to parties engaged in the same trade with the applicants being prohibited or prevented from using any part of this trade mark, or, if innocently using it or any part of it,

the penalties they might subject themselves to if a monopoly of its uses be so granted. But such a position or anticipated consequence will be found to have no foundation in reason or fact, for the penal section cannot be so construed, nor will any part of it be found to operate so unjustly towards the public. The section simply declares that any person, other than the person who has the registered trade mark, who uses it, or any part of it, in marking his own goods or packages with intent to deceive and induce others to believe that the goods or packages are those of the proprietor of the trade mark, shall be subject to the penalties named therein. This must be regarded as a proper protection of the proprietor's rights and an indispensable complement to the other provisions, to render them effectual and to secure the practical operation of the act.

In my judgment, the parties are entitled to have their brand or trade mark, with the described *indicia* duly registered in accordance with the provisions of the act, as applied for by them, and to that end this rule should accordingly be made absolute.

HON. SIR F. B. T. CARTER, C. J. :

It is not necessary that I should recapitulate all the particulars connected with this matter, into which Mr. Justice Little has so fully entered ; but as I had not seen his judgment before publication, and although substantially coinciding with him, as there is apparently in a point or two some difference in our views, I think it proper that in this, to us, novel proceeding, I should give expression to my opinion.

A registration of trade mark is comparatively of recent date. The first act for the establishment of a register was the Imperial act 38 and 39 Vic., cap. 91, which was repealed by the 46th and 47th Vic., cap. 57, amended by the last act of 1888. Our first local act on this subject was the 43rd Vic., cap. 15, which was repealed by the 51st Vic., cap. 21, under which this application is made.

In this last act there is no specific description given of a trade mark as in the English act ; and were it not for the generality of the terms in the 20th section, and which I understood at the time of the argument had accidentally been inserted as taken from another act, I should have had considerable difficulty in at all entertaining this proceeding, although the intention of the legislature is sufficiently manifested.

There are numerous cases decided under the Imperial acts, and which I think, so far as in principle they can be made applicable to our act, should govern us in this country. In some respects there has not been concurrence in opinion among the judges and courts, but in one particular at least there has been, and that is that words merely descriptive cannot be registered so as to give an exclusive right to the use of the words, and if such had got on the register the court would, on application, remove them; such as in this case the words "prime dry cod-fish," which are common to the trade. The last I can find of several cases decided on this point is *Humphries v. Taylor Drug Co.*, (No. 2), 59 L. T., 820.

There has been no affidavit produced in opposition to the claim of the Messrs. Tessier, and we may therefore assume to be admitted as a fact the lengthened user of the trade marks in question, in shipments made by them to the Brazils and West Indies

I concur with my brother judge that the applicants are entitled to have these trade marks registered, and that the above descriptive words may be used in combination, but that on the register and in the certificate it should be made to appear that they are not entitled to the exclusive use of those words, and should disclaim any right thereto.

The act certainly requires amendment in some particulars, and besides what I have before referred to, I would suggest that a public notice, as in the case of patents, should be given of an intended application, and summary provision made for effectuating registration, and if need be, rectification of the register, as in the English acts.

Mr. Kent, Q. C., for the applicant.

Sir J. S. Winter, Q. C., for the Colonial Secretary.

1890, *February*. CARTER, C. J. ; LITTLE, J.

Contract—Consideration—Marriage settlement—Slander of title.

A woman being possessed of certain lands, in contemplation of her marriage, assigned the same by deed to a trustee, to hold (1) for her use till her marriage; (2) for her use for the term of her natural life, and (3) after her decease, then for the use of her children begotten by the contemplated marriage. A child was born of the marriage. Both parents died. Some time before her death the mother sold the property of the *cestui que* trust to the plaintiff, who, upon endeavouring to sell, was stopped by a public notice from the trustee under the deed of trust. On a case stated for the opinion of the Court,

Held—(1) That the trust deed was not voluntary and void against the plaintiff purchaser; (2) The mother had no authority to sell, so as to deprive the *cestui que* trust of his right in remainder after her life estate.

THIS cause was commenced by action for slander of title, and subsequently the parties agreed upon the following special case for the opinion of the court upon specific queries stated:—

1. Catherine Carew of Brigus, in the Northern District, was possessed of certain property in Brigus aforesaid.

2. Prior to coverture the said Catherine Carew and John Summers, who subsequently became the husband of the said Catherine Carew, assigned to Patrick J. Scott, a portion (as trustee) of the said property upon the following trust and in the words:

“To the use of the said Catherine Carew and her heirs, until her said intended marriage shall be solemnized, and from and after the solemnization thereof to the use of the said Catherine Carew, for and during the term of her natural life to and for her own sole and separate use and benefit, then in trust to pay the rents, issues and profits of the said land and premises into the proper hands of the said Catherine Carew, for and during her life to and for the sole, separate and particular use and benefit, and at the sole and uncontrolled disposal of the said Catherine Carew notwithstanding her said intended coverture and without the same being subject to the debts, or engagements of the said John Summers, and the receipt of the said Catherine Carew alone, notwithstanding her coverture, shall be good and sufficient discharge for so much of the said rent and profits as shall be therein acknowledged, and from and after the decease of the said Catherine Carew, then to the use of all and every the child and children of the body of the said Catherine Carew, by the said John Summers, to be begotten; and if but one then to the use of such one child.”

3. By deed dated the 16th October, 1884, Catherine Summers, then a widow, assigned for the consideration of £120, a portion of the land situated at Brigus, aforesaid, assigned by way of trust to Patrick J. Scott, plaintiff, abutted and bounded as follows:

"At the southern end of the long house, bounded on two sides by converging roads, and on the north side by the said house. Also, all her right, title and interest in and to that piece of land situated at Brigus, aforesaid, to the eastward of said house, and separated from it by a public road, being meadow and garden land, bounded north by land of one Thomas Spracklin, east by land of John Bartlett, south by land of late Patrick Gaul, west by said road, containing about a half acre; said assignment contained covenants for good title and further assurance."

4. There is a child under age surviving both parents, who are deceased.

5. Plaintiff advertised said land for sale, but was prevented from selling the same by reason of a notice which appeared in the public newspapers warning intending purchasers from buying the same, said notice being signed by defendants.

The questions for the opinion of the court are:—

1. Whether the said deed of trust was void as against a purchaser for a valuable consideration.

2. Whether the said Catherine Summers had power to sell said piece of land to plaintiff.

3. Whether plaintiff has been damaged by being kept out of the possession of said piece of land and selling the same.

The subject of this proceeding is of considerable importance both to vendors and purchasers of land in this colony, and fortunately the law is so well established on the principal point, there is little difficulty in arriving at a decision. Shortly then, it appears by the admitted facts, that Catherine Carew, who was possessed of land at Brigus, in the Northern District, just prior to her marriage with John Summers, entered into an indenture, by way of settlement, upon the trusts set out in the case, which was duly registered; there was a child of the marriage, who is still living, under age, and the husband having died the said Catherine then a widow, sold and assigned to Mr. Jerritt, a portion of the land so settled, which coming to the knowledge of Mr. Scott, the trustee, he and the child, Thomas Summers, jr, gave the public warning referred to, hence the action by Jerritt for slander of title; I may observe this warning was given after the death of the widow. If there had been no anti-nuptial settlement, and no alienation of the land up to the death of the husband, there can be no doubt that the property would, as real chattels, revert to the widow as of her former estate before intermarriage; and if the settlement had been what the law denominates voluntary, and not for valuable consideration, it would, under the statute 27th Eliz., cap. 4, made perpetual by 39th Eliz., cap. 18, be void as against a *bona fide*

purchaser for value, with or without notice, and in this case the sale to Mr. Jerritt would have been effectually made.

It has been settled by numerous decisions that every voluntary conveyance is by the aforesaid statute, 27th Eliz., cap. 4, made void as against subsequent *bona fide* purchasers for value. *Doe v. Manning*, 9, E. 70; *Myers v. Elliott*, 16 Q. B. D., 526; *Id.* 121, &c.

There is a vast difference between a settlement made after and before marriage, any conveyance made by a husband in favor of his wife and children after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue, is voluntary and void against purchasers by force of the act. *Woodless, cases cited, Colville v. Parker, Cro. Jac.*, 158; *Goodwright vs. Moses*, 2, Black., 1019; *Chapmon vs. Emery, Cowp.*, 278, &c.; but a settlement made on a wife or children prior to marriage, is a conveyance for valuable consideration by reason of the marriage itself. *Colville vs. Parker, Cro. Jac.*, 158; *Doyle vs. Ward*, 1 Ch., ca. 99; *Brown vs. Jones*, 1 Atk., 188. And the marriage consideration runs through the whole settlement so far as it relates to the husband and wife and issue. *Nairn vs. Prowse*, 6 Ves., junr., 752, 2, sug., v. p., 11th ed., 931; *Clurk v. Wright*, 6 H. & N., s. c. nom.; *Wright v. Dickenson*, 21, Exch. Cham., is substantially analogous to the present case; there, out of her own estate, a woman, owner in fee-simple of the property sought to be recovered, had an only child, the plaintiff. Prior to a second marriage, just before which she and intended husband executed a deed by which she was to have and enjoy for separate use during life as to a portion, remainder to use of husband for life, remainder to use of plaintiff, his heirs and assigns for ever, she and husband joined in a mortgage to one under whom defendant claimed; they were both dead, and plaintiff brought the ejectment, claiming title under the limitation to him in the marriage settlement, and the court below 5th H. & N. 501, and court of appeal supra, held that the limitation to the plaintiff though illegitimate was not voluntary, and void as against the defendant by the 27th Eliz., cap. 4.

Having regard to the decisions in answer to the first query in this case, I am of opinion, the trust deed was not voluntary, and void against the purchaser, Mr. Jerritt, but was founded on a recognized valuable consideration.

To the 2nd.—Mrs. Summers had not authority to sell the

said land to the plaintiff, Jerrett, so as to deprive her child, *cestui que trust*, of his right in remainder after her life estate.

To the 3rd—Entertaining the opinion I have expressed, the plaintiff could not have been damaged in law by the action of the defendants, who were, I consider, not only justified but the trustee, Scott, would have been remiss in his duty to the *cestui que trust* had he omitted to give the warning complained of.

HON. MR. JUSTICE LITTLE:

THE parties litigant in these proceedings arranged and agreed on a special case containing their respective contentions and disputes, and recently submitted it on argument to the adjudication of this court.

From the case thus stated, it would appear that one Catherine Carew was possessed in fee of certain lands, situate at Brigus, and being about to intermarry with one John Summers, it was agreed by them that the said lands should be settled and formally conveyed by deed to a trustee, who would hold the same, subject to the trusts, limitations and conditions so mutually arranged on by them. The deed appears to have been entered into and duly executed by them, and by P. J. Scott, as such trustee, before the solemnization of such marriage, and bears date the 20th day of June, 1871.

In the recital of this deed of settlement, the intended marriage is set out as one of the considerations for its making, and for the assignment of the land in question. It stipulates and provides for the holding of the land by the trustee to the sole use of the settlor, Catherine, during her life, and on her death there is a limitation over to the absolute use and behoof of the child or children of the marriage. After the marriage the lands were held and occupied by them, and remained unincumbered and undisturbed up to the death of the husband. It further appears the widow died recently, leaving a son now living, the only issue of the said marriage. After the husband's death, the widow, in the year 1884, executed a bill of sale to Jerritt, the plaintiff, of a part of the lands so conveyed by the trust deed, the consideration money being \$480. To this sale and conveyance the trustee, it is stated, was in no way an assenting party; but on the contrary, as alleged, he expressly informed the plaintiff of his position, and gave public notice through the press of the nature of the interests of those connected with the property. However, it appears the widow did sell, and the

plaintiff was content to accept her conveyance as sufficient to clothe him with a legal title to the land. It is admitted the purchaser acted in good faith in the transaction, and the purchase money was sufficient value for the land so taken by him.

But the trustee realising his own accountability to the infant, *cestui que trust* for the whole of the property, conveyed under the deed of settlement, contending for the inviolability of that document as against the subsequent bill of sale, maintains that the widow had no power or authority to intermeddle with the land or to sell or convey any part to the plaintiff, and the legal and equitable title thereto being in him, the trustee, the obligation attached of maintaining by these proceedings the provisions of the deed to which he was a party.

On the part of the purchaser, on the other hand, his counsel urges in the special case, and in argument, that the deed being merely a voluntary settlement on the part of the settlor, under and by force of the provisions of the 27th Elizabeth, c 14, must be held and treated as void as against the subsequent purchaser for value, even with notice of the existence of the settlement. That the settlor, Catherine Carew, having held the land in fee prior to the marriage, and during coverture, its legal position having been in no way altered, on the husband's death it again became absolutely and solely hers, and subject to her disposition.

The grounds of the dispute are consequently few, and may be confined, as were the arguments of counsel at the hearing, to the legal and equitable force and effect of the provisions of the deed of settlement on the rights and interests of the parties to the land in question.

After duly considering the statements and arguments of counsel, and the application of the authorities cited by them in support of their respective contentions, and on further reference to like authorities, I am clearly of opinion this deed of settlement cannot be so impeached or rendered void, on the ground so advanced on behalf of the purchaser of the land, the subject of the conveyance to him.

I could unhesitatingly recognize the force of Mr. McNeily's contention in favour of the successful application of the provisions of the statute relied on, if this deed were of the voluntary character described by him. But on the threshold of his case the deed is stated and must be accepted as an ante-nuptial settlement, whereas the cases cited and the principles therein referred to, will be found to relate to post nuptial settlements,

or to such as have been entered into not in view of marriage, but based on some such consideration as is termed meritorious. The provisions of the statute have been reasonably the subject of much adverse criticism in the discussion of cases subject to them, or sought to be brought within their operation.

The grounds of their application are now, however, clearly defined, and no uncertainty can exist when their operation may be invoked in avoidance of such deeds or settlements of the character or class to which the purchaser's counsel would relegate the deed now impugned.

For instance, the following extract from a judgment of Chief Justice Cockburns in an analogous case may be taken as embodying the governing principles in such cases: "The operation of the statute in avoiding in favour of purchasers for value, whether with or without notice, conveyances in favour of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken to be definitely settled that a provision even for a man's wife and children, however sacred in a moral point of view the duty of making such a provision may be, is bad against a future purchaser as being without consideration and voluntary."

Such is the unmistakable ruling of the courts in reference to settlements made under a state of circumstances very different from those presented in this case. There, for instance, a party of independent means, being desirous of securing a portion for the benefit of his family, freely and voluntarily executes a deed of trust embodying his intentions, reciting them as the considerations on which it is based; subsequently, it may be years after, from some motive or reason, arising it may be from a change in his circumstances or otherwise, he sells or mortgages the property so assigned,—the law by force of this principle of construction of the statute would confirm to the purchaser in the sale, or the mortgagee in his mortgage. This is in the case of a purely voluntary settlement, in which no real valuable consideration can be found or is recited. But what do we find here as the acknowledged facts and data for the suggested application of the same principle? Evidently accepted proposals and certainly mutual concessions and agreements actuating the parties, terminating in the execution of an ante-nuptial deed of settlement, in which is recited as the consideration, the solemnization of the intended marriage—the assignment of the property to the trustee for the uses and purposes named, the specific

limitations of the interests of the *cestui que trusts*. On its execution and for many years subsequently, its provisions are duly observed, some years after the death of one of the settlors, the survivor assumes to have the absolute disposition of the property, and disposes of it and conveys it away by bill of sale, in derogation of the deed and in deprivation of the right of remainder of the only issue of the marriage. Aside, then, from the impolicy and questionable morality attending the setting aside of a deed so solemnly entered into and acted upon, we must ascertain if it contains that ingredient necessary to give it such force and legal effect, as to relieve it from the operation of the principle to which reference is made.

The consideration recited on the face of this deed is the intended or proposed marriage between the settlors,—is that, then, a sufficiently valid consideration in law to enforce its recognition?

In reply it might be sufficient to observe that in the case of marriage, the impossibility of resting the consideration by replacing either party in their original status might be a sufficient reason why full effect should be given to such an arrangement.

The principle that marriage is the highest consideration known to the law is too well established to call for extended or particular reference from authority.

But in addition, it is placed beyond cavil that marriage is a valuable consideration, and the law esteems it an equivalent given for the grant: *17 Ves.* 271; *Lewin on Trusts*, 633; *1 Atkins*, 158; also *Darts. V. and P.*, p. 423. Undoubtedly a valuable consideration makes the deed good against a subsequent purchaser. *Chitty*, 19; *Gully vs. Bishop*, 12 *B. and C.*, 584. Again, it is well established that a settlement, made with a view to marriage, on a wife and the issue of the marriage, will be good against a future purchaser for value although without notice. *Clark vs Wright*, 9 *W. R's.*

And further, in the case of *Parker vs. Carter*, 4 *Hare*, p. 400, we find that a sale having been made by a surviving settlor of her own lands after a voluntary deed and fine by husband and wife, it was held that the deed and fine were not voluntary, for the joining husband and wife was a good consideration for the act of each, and the subsequent sale was not by the same party. This latter ruling is peculiarly in place as bearing on the disposition under the sale effected here by the surviving settlor alone.

And it was urged in support of such sale that the land being

originally the wife's, the right of disposal should be unquestioned. It is clear no such right of re-vesting existed in the survivor, and further in support of such ruling and as opposed to the view that this is such a voluntary deed, as contended for by the purchaser, it is laid down by Justice Blackburn in the same case, "that when once it is shown that the intended husband and wife bargained that part of what would have been the joint fund of the matrimonial firm, should upon marriage go in a particular way, it is immaterial whether it was part of what the husband would have brought in or the wife that is so settled,—it is equally part of the bargain, and so not voluntary."

Other such references to authorities might be made, but sufficient is given in my judgment to sustain this settlement, and negative the argument urged to impeach it. It may be as well to add that it will be found on reference to these and other authorities cited in the judgment given, that the legal estate continued throughout in the trustee and as set out in the deed; she, the settlor, merely had the interest in the rents and profits during her life, the remainder being in the issue of the marriage—or, in the language used in treating of this principle, in "Lewin on Trusts." The possession of the *cestui que trusts* under the trusts of a settlement is the possession of the trustee, which is not interrupted by the death of the *cestui que trust*, but enures for the benefit of the person next entitled.

This deed, therefore, having been entered into, and made for and in consideration of the marriage, which is a valuable consideration, and no charge of fraud being imputed to its making, and having had effect given to its provisions and trusts, in my judgment it cannot now be impeached nor held to be void, on the grounds relied on by the plaintiff in this matter.

Mr. I. R. McNeily, for plaintiff.

Mr. P. J. Scott, Q. C., for defendant.

1890, February. SIR F. B. T. CARTER, C. J.

Contract—Policy of Insurance—Insurance Club—Construction of Rules of Club—Time.

The schooner *Frederick* was insured in the St. John's Mutual Insurance Club from noon of the first day of April till noon of the fifteenth day of December. She was lost at 6.30 p. m. on the fifteenth of December. Insured contended that as schooner was prevented by stress of weather from reaching her destination and not from ordinary causes, her insurance was existing at time of loss and would so continue while the voyage was incomplete according to rules of club.

Held—That the two extremes of the time, are the termini of the risk. The court has no authority to modify a contract as regards hours any more than as regards months or years.

THE following special case submitted under rule of court, for the decision of this court, by the arbitrators whose names are subscribed thereto, appointed by the parties under rules of the defendant club:—

SPECIAL CASE FOR OPINION OF SUPREME COURT.

The question of the claim against the insurance club in this matter was referred to arbitration under the 19th rule of the club hereto annexed.

On enquiry the arbitrators find that a question of law arises which the determination of the claim will mainly if not entirely depend, and upon which the arbitrators desire to have the opinion of the court.

The question arises out of the following facts:

The schooner *Frederick* was insured in the St. John's Mutual Insurance Club, for the season of 1887, under the rules hereto annexed.

On the morning of the 11th December, 1887, the said vessel left Gander Bay, Notre Dame Bay, with a cargo of timber, bound for Carbonear, in Conception Bay. During the voyage the weather became stormy and winds adverse, and she put into Seldom-come-by. After a day or two at Seldom-come-by she started on her voyage to Carbonear, leaving Seldom-come-by on the morning of the 15th December, about one o'clock. During the day of the 15th the wind again became adverse and at about 6.30 p. m., on attempting to enter the harbor of Greenspond, the vessel struck upon a rock and was lost.

It is agreed that no blame can be attached to the owner, captain or crew, the vessel having been "lost by the perils insured against."

It is also agreed that the schooner could have under ordinary circumstances completed her voyage from Gander Bay to Capetown, if she had not been prevented by unusually boisterous weather.

The underwriters contend that as the vessel was lost after noon on the 15th of December, there is, under the 13th rule, no liability on the club.

The question as to the liability of the club is respectfully submitted to the court for determination.

J. S. WINTER,
GEORGE H. EMERSON,
ALEX. J. W. MCNEILY, } Arbitrators

St. John's, February 5th, 1890.

The circumstances connected with the loss of the plaintiff vessel, *Frederick*, are sufficiently set out in the case, and as there is no dispute respecting the facts, the only question for the consideration and determination of the court, is the legal construction to be placed on the terms of the following 13th rule of the club, which is an essential part of the mutual contract between the parties, and in the application of which the contention has arisen:—

“XIII.—Vessels may be insured by this society from noon of the first day of April until noon of the fifteenth day of Dec. ; and vessels once entered shall continue to be liable for claims by the society during the whole term unless they or any of them shall be withdrawn from the protection of the society, by entering upon a voyage or voyages beyond the society's limits, in which case they will cease to be insured by the society, but will be liable for one-half of the original proportion of their contributions for all losses in the society subsequent to such withdrawal. The certificates of vessels so withdrawn are to be surrendered to the secretaries before any vessel shall commence such voyage beyond such limits, or before they shall be entitled to the remission of one-half of her original share of liability. Any vessel or vessels so withdrawn may be permitted to re-enter this society for the remainder of the season, on passing survey and on condition that such vessel or vessels so re-entered shall be liable for their full proportion of the losses for the season. No vessel insured in this society shall be permitted to leave any port or place before the fifteenth day of December, bound for any other port or place, without allowing a reasonable time, under ordinary circumstances for her arrival at the latter port or place before noon of the same date. In any case of violation of this rule, the insurance upon the vessel shall be deemed to have ceased from the time of her departure upon such voyage. There shall not in any case be a claim against the society in respect of the loss of any vessel abandoned at sea after the fifteenth December. All vessels insured in this society are prohibited from any participation in the sealing voyage, and from entering upon any voyage not contemplated by the first rule.”

It is admitted the plaintiff's vessel was insured in the club for the season of 1887, that is, from noon of the first day of April to noon of the fifteenth day of December, and became thereby as validly insured as if by a separate time policy issued by any insurance company or society. By this kind of insurance the two extremes of the time are the termini of the risk, which necessarily ceases, unless otherwise provided for, when the time limited comes to an end. Noon of the 15th December is a fixed and definite time, and then this vessel was prosecuting a voyage without encountering any disaster, some six hours afterwards when entering an intermediate port she became wrecked and lost from the perils theretofore insured against. But the plaintiff contends that as it is admitted by the case the vessel could, under ordinary circumstances, have completed her voyage from Gander Bay, which place she left on the 11th of December, to Carbonear, if she had not been prevented by unusually boisterous weather, she was thereby still covered by the insurance under the latter part of the rule referred to, and would remain so while the voyage was incomplete, although the extreme time so fixed had expired. It is to be remarked that the case does not state that the vessel could have completed her voyage or have arrived at her destination before noon of the said date, "viz., 15th December." Assuming, however, that it had been so stated and the omission unintentional, we do not think this part of the rule contemplated, or that it is susceptible of an interpretation, that because a vessel insured in the club, left a port for another within a reasonable time to have arrived at the latter before noon of the 15th December, the risk was to be considered unexpired and continuing, but, on the contrary, that if she did not do so the insurance should, as the rule expressly states, "be deemed to have ceased from the time of her departure upon such voyage." The defendant club might not unfairly assert that the very loss in this case is illustrative of the wisdom of this provision or condition in the rule, in deterring owners from too long protracting departure from port on the last voyage for the season, along a known tempestuous and dangerous coast. If the contention of the plaintiff were maintained it is evident that much confusion would exist, and the annual settling of the accounts of the club, which from experience we are aware takes place with local mutual insurance societies about the end of the year, be rendered impracticable from recognizing without special provision therefor outstanding risks beyond the limited period, which might extend over months, a condition of

things which could scarcely ever have been conceived, and for which certainly there was no warrant, under the rules of the club, when this insurance was effected and current.

This may be regarded as a hard case on the plaintiff, especially as the loss is admittedly a *bona fide* one, but this court has no authority to alter or modify the effect of a clear contract, as regards hours, any more than days or months, which the parties voluntarily entered into for mutual protection and which is equally obligatory on all the members.

IN RE INSOLVENCY RICHARD HARVEY.

1890, *April*. HON. MR. JUSTICE LITTLE.

Insolvency--Husband and wife--Monies lent for trade purposes--Married Woman's Property Act, 1883--Claim on trustee of Insolvent.

The wife of the insolvent was entitled to certain property in her own right, the rents from which were received by her husband from time to time, and for some years previous to his insolvency appropriated to his business, and with wife's knowledge. The wife claimed to rank as a creditor on insolvent estate for monies so appropriated, and that the words of the "Married Woman's Property Act, 1883," do not apply, as such lending must be regarded as a trust fund. The matter being referred to the master, A. J. W. McNeily, Q. C., reported against the claim. On argument on exceptions to report,

Held,—When husband and wife live together the wife cannot charge the husband or his estate as her debtor for her separate income which she has permitted him to receive. Report upheld.

THIS matter was referred to Alex. J. W. McNeily, Q. C., as master-in-chancery, to inquire into and report thereon to the court. His report was duly made and filed of record in February last.

The evidence in relation to the claim was minutely gone into and carefully taken, affording a clear history of the source from which the separate estate of the claimant was derived, its limitations and the trusts it was subject to. Portions of the property had been acquired by her, as separate estate, under the will of her grandfather, one Thomas Williams, other portions consisting of other interests in lands of the same party, had been purchased by Harvey some years ago and assigned by deed to her brother, to be held subject to certain expressed trusts and limitations in favor of the claimant. The positions and relations of the parties thus created appear to have re-

mained undisturbed up to within a period of two months prior to the insolvency of Harvey, when it is stated, in evidence, an assignment of the deed of trust was regularly entered into and executed by the trustee, Mrs. Harvey, and the insolvent, whereby the latter was substituted for the original trustee, and the separate estate of the claimant vested in him, to hold the same for the use and benefit of Lily Harvey, an infant daughter. This deed was duly registered shortly before the declaration of insolvency. The deed, the circumstances under which it was executed by the *cestui que trust*, and the trustee, or its effect on their respective positions are not now the subject of criticism, consequently may not call for further notice.

The evidence, however, in relation to its existence, was very properly gone into by the master, to throw light on the other matters in proof and upon statements of the insolvent, bearing on the continued appropriation to his trade purposes of the rents collected by him from his wife's property.

These rents, it appeared, he customarily and openly collected for some ten or eleven years, and appropriated or applied them at his discretion in and to his business.

And although he states this continued appropriation was without his wife's knowledge, and although she alleges she never received any statement of account from him, still she deposes she was aware that in previous business ventures Harvey had used her monies, thus received, for purposes of his own.

The grounds urged by Sir J. S. Winter, as counsel for the claimant, apparently cover every position that could be advanced in order to rank her as an ordinary creditor. The master has properly confined his attention to only three of these grounds, which in substance may be briefly accepted, as first assuming a power and right in the claimant's trustee to recover from the insolvent estate the monies so received by Harvey, notwithstanding the alleged acquiescence of the *cestui que trust* in their collection and appropriation. Second, that the words or terms of the "Married Women's Property Act, 1883," do not apply to the case, which must be regarded as that of a trust, as such, lending and entrusting the trust property of a married woman to her husband and therefore the monies so received by the insolvent were received *dehors* the present legislation. That section three of the Act does not apply or prejudice the rights of a woman married before the Act was passed, and the words "entrusted by her to her husband," have reference only to a deliberate act of the *feme covert*, and do not include a mere pre-

sumable trust; and that the words "or otherwise," are words *ejusdem generis*, and have reference only to a known purpose in respect of the husband's trade or business. The master, in his report, observes on all these objections, passing them in review and fully disposing of them in the order in which they were advanced by counsel, and finally disallows the claim of Mrs. Harvey to rank as a creditor, or entitled to a dividend out of the asset's of her husband's insolvent estate, and states that whatever claim she may have must be postponed until the claims of the present creditors are satisfied.

The evidence in fact, shows, and it is in effect admitted, that the *cestui que trust* was aware, and her trustee must have been equally well aware of the fact, that the insolvent, whilst in the receipt of these rents or income from her property, was appropriating them to the speculative purposes of his trade. The claimant directly testifies to such a knowledge as to one period in his business or trade. We also find it stated by the parties in evidence, that a separate account was regularly kept in the insolvent's books in the name of the claimant, and that there was a sum of \$1,600 entered to the credit of that account. This all evidenced a deliberate creation of authority, by means of which the insolvent became entrusted with these monies, dealt with them, and actually directed at one time a payment to be made out of them to the claimant, during his own absence from the country.

The evidence so strongly fortifies the position taken by the master that it would appear unnecessary to refer to authority against the contentions and the arguments relied on in support of the claim thus advanced. However, one or two will suffice in recognition of the established doctrine applicable to the relative rights of husband and wife and their estates under such or like circumstances.

But before doing so it may be well to observe that the provisions of our act of 1883 are partially a transcript of the Imperial Act of 1882; and the third section in question is literally transcribed from the third section of the latter act. So that adjudications in English courts in reference to the operation and effect of such portions of the statute, may well apply in matters arising under our act in analogous cases here. We therefore find in a judgment of *Care, J.*, in the matter of *aparte Tidswell, 35 v. W. R.*, that the meaning and application of the words of this third section have been subjected to considerable legal misapprehension and judicial criticism. In this matter of

Harvey's, it was urged before the master, on behalf of the claimant, that the words "or otherwise" are only *ejusdem generis*, and refer to a known purpose in respect of the husband's trade; in the reported case it was also contended the words were of the like character or meaning of the connected words, and had reference to the immediately preceding words "carried on by him"; and on behalf of the trustee it was urged that the words mean, for the purpose of the trade or business carried on by the husband or for a different purpose. The learned judge finally observed, "I *guess* rather than conclude that the draftsman meant to say, 'any money of the wife lent by her to her husband for the purposes of any trade or business carried on by him, whether alone or in partnership with others, and whether personally or by an agent, &c.'"

However, the requirements of this case do not call for any further reference to any subtle reasonings on the constructions of the language of the section and its application to the facts of the case. There it appeared the wife had directly advanced, on loan, monies to her husband for private purposes *outside* of his trade and business, and in that vital particular is clearly distinguishable from the facts on which this case entirely rests. And here, be it observed, the wife deposes that in previous business ventures her husband had used her money for his own trade purposes.

In the course of the judgment delivered on that matter in Tidwell's estate, reference is made to the principle "that he who shares in the profits of a trade or undertaking should also run some risk of loss, and should at any rate not be allowed to prove for his capital in competition with creditors who do not share in those profits." Similar considerations apply to a wife who lends money to her husband * * as she must in ordinary circumstances share in the benefit, &c. It might be observed in this view of the case, aside from the operation of the terms of the act, that the position to which the wife's claim is relegated by the master is otherwise sustainable. We find, for instance, that while a husband and wife are living together in amity, the receipt by the husband of the separate income of the wife has been regarded as a gift, and as applied for the joint benefit and for the maintenance of their household and the like. In *re Flameruk*, 37 W. R., p. 503. Again it is more tersely given in the judgment rendered in the case of *Hale vs. Sheldrake*, 5 L. T. Reps., p. 277. When husband and wife have lived together, the wife cannot charge the husband, or his estate, as

her debtor for arrears of her separate income which she has permitted him to receive, &c. Where the circumstances are such that the wife's consent or acquiescence may be fairly presumed, the presumption rises immediately on such receipt by the husband and bars all claims on the part of the wife or her representatives. *2 Ves., Sen. 190.*

The justice and fairness of such a ruling is obvious, for a claimant, if successful under such circumstances, would have received the benefit from the use of her income by the husband in his business, in the support and maintenance of the domestic establishment, and also, be further recouped by the receipt of a dividend as a creditor from the husband's insolvent estate. This would obviously work an injustice to other creditors whose monies were also used in such trade and business, but whose claims are to be met merely by the dividend they may be entitled out of the same estate.

It is therefore manifest, that as well under the terms and meaning of the statute as under the principles of law, so clearly and positively laid down, this claim of Mrs. Harvey's could not be allowed. In fact it must have been from some misconceived idea of the circumstances that parties could have been induced to have asserted such a claim. We find here the husband and wife living in amity, supporting, for the needs of their family, a domestic establishment, the wife entitled to an annual income, the husband tacitly, if not expressly, authorised to collect and receive that income for a number of years, and his expenditure of it, acquiesced in by the wife, in the known trade and business carried on by him; surely such facts and circumstances present as strong a case for the application of the rules of law as could well be imagined. The exceptions are therefore disallowed and the master's report stands confirmed.

Exceptions were also taken to the report of the master on the claim made in behalf of the infant daughter, Lily Harvey. In the course of the argument these exceptions were withdrawn, the report in favour of the claim therefore stands confirmed. As already observed, the court cannot take notice, in its decision, of any matter outside of the only issue now submitted for consideration, and therefore abstains from comment on the assignment of the trust deed or upon the circumstances connected with it.

Sir J. S. Winter, Q. C., and Mr. Morison, for the claimant.

Mr. Emerson and Mr. Horwood for the trustees.

1890. BY THE COURT.

Will—Testamentary capacity—Partial unsoundness of mind—Coercion—Fraud.

On the proof of the will of testator it was contended that, at the time of making he was of unsound mind, blind and deaf, and that the will was obtained by the fraud and coercion of some of the next of kin. The matter being fully heard and a number of witnesses called,

Held—It is sufficient if the testator has such a mind and memory as will enable him to understand the disposition of his property in its simple form. In deciding upon the capacity of the testator it is the soundness of his mind, and not the state of his bodily health that must be regarded. To support undue influence it must be shown to have amounted to coercion destructive of free agency. The will was admitted to proof.

THE document purporting to be the last will and testament of the testator was duly proved in common form on the seventeenth of February last; and the executor, Daniel Ashley, a son of testator, and his sole legatee, having applied for probate, others of the next of kin opposed such grant and called for proof, in solemn form of the alleged will. In their answers to the citations issued by reason of the *caveat* filed by them against his application, they allege the invalidity of the document as such will on the grounds that, (1), the testator, at the time of the making thereof, was not of sound and disposing mind; (2), he was blind, deaf, illiterate, and of extreme old age; and (3), that the will was obtained by the fraud, coercion and importunity of the executor—Daniel Ashley.

In pursuance of the order thereupon made by the court, the matter of such proof was fully gone into—fourteen witnesses having been examined and counsel heard for the respective parties in support of their contentions.

From the evidence of Mr. Morison it appeared he had acted as solicitor for the testator for four or five years, and had known him for about ten years. In the fall of 1888 he had conducted the defence of an action at law brought against Ashley by his daughter, Ellen, for wages, in which she succeeded, and as a result Ashley was obliged to pay a considerable amount to meet the verdict and costs. Shortly after he informed Mr. Morison that in consequence of the course of conduct thus adopted by the daughter and others of his children, he had determined on altering his will, and requested Mr. Morison to call at his house for this purpose. Mr. Morison deposed he did not at that time attend as requested, but on being sent for by Ashley some months subsequently, he did call; that testator

then referred to the object of his visit, spoke of his property and gave verbal instructions for the making of his will. These were taken down in writing, and subsequently Morison had them formulated and engrossed, and embodied in the will propounded. That, at the time of taking these instructions, he was alone with testator, the executor, Daniel, was not present. That some time after he again attended at Ashley's house, bringing with him Mr. J. C. Carter, accountant, to witness the execution of the intended will. Mr. Ashley was again alone in the room, and witness informed him of the object of their calling, and read over the document to him in the presence of Mr. Carter. The testator expressed his approval of it and, in their presence, signed the paper by placing his mark thereto. Thereupon they subscribed their names to it in testator's presence, and that of each other. This was on the 25th day of July, 1889. He further deposed that the testator's mental condition at this time was perfectly sound, and during his ten years acquaintance with him he saw nothing to lead him to believe that testator was of weak intellect, but on the contrary, he found him particular and exact in matters connected with the professional services witness had to transact for him, in the collection of rents, the disposal of a portion of land and the conduct of two law suits. He informed witness he "managed his own affairs and would be master of them as long as he lived." Witness believed his age to be over 100 years from his own statement, and he had been physically a strong man, but was much stooped or bent, and weak, as he himself said, from the knees down. He was obliged to use a stick in moving about, and, at the time of the making of his will, rested his hands on a chair which he moved before him in going into the room and up to the table on which he signed the will. He only knew him to have been confined to his bed on one occasion when he visited him. He had made three or four wills for him; this last differed from the others. His wife predeceased him some two or three years ago. The family relations had been somewhat disturbed, particularly since the law suit referred to.

The evidence of the circumstances attending the execution of the propounded will was confirmed by Mr. Carter, the only other subscribing witness and party present at the time.

The Rev. Mr. Crooke deposed he had known testator for four years, and had last spoken to him three days before his death; that his last illness lasted for about twenty-four hours; had frequently conversed with him, and at all times found his

memory and intelligence to be good. Physically his general health appeared to be perfect, but he moved around in the house with the assistance of a chair, and from his own account his decrepitude resulted from old age. He saw nothing whatever in the testator to lead the witness to doubt his mental capacity; his eye-sight appeared to be good and his hearing as good as could be expected in one of his advanced years.

The Rev. Mr. Ryan had known him for seventeen years, and had had during that time frequent conversations with him, and up to within a couple of months of his death. He was very aged; his limbs very weak; his eye-sight good, but his hearing imperfect, not what might ordinarily be called deaf, but hard of hearing. He always regarded him as a most sensible man and never observed anything strange in his conduct or manner to create a doubt as to the soundness of his mental faculties.

Mr. Leard, a builder and joiner, deposed that two years ago he entered into a contract with the deceased, for the alteration and extension of a dwelling-house in which he resided on Patrick street. The son, Daniel Ashley, had first spoken to him and brought him to the old man, with whom he made the contract. He furnished plans, estimates, and a tender for the work, and talked over the contract with testator. After having entered on the work the testator suggested an extension of the house to utilise the ground adjoining, by means of which the single dwelling would become a double house, and thereby yield an increased rent. The alteration in the contract was adopted and the work completed accordingly. The testator discussed the cost and the character of the work to be done, and witness deposed "he got no soft lift out of him." The work extended over a period of eight months, and during that time witness frequently conversed with him and from time to time found fault with some of the work, material, &c., and appeared to have a sensible knowledge of the work, and also of his own interest. The contract was in writing and signed by Daniel, the son. It was necessary to speak loud to the old man to make him hear you, but his speech and eye-sight were good. He desired witness when he required money to speak to Daniel. On one occasion they hadn't money to meet an installment, and witness suggested to the old man that he might give him a note for it through a bank; this he declined doing at first, but ultimately assented on witness having to pay the discount. Daniel signed the note in the old man's presence for him; it was subsequently taken up. The old man informed witness that his

age was about 114 years. Witness believed that his faculties were good at this time.

Such is a necessarily condensed summary of the evidence of these witnesses, whose disinterestedness and intelligence were unquestioned, and whose information in relation to the matters deposed to appeared to be reliable and authoritative.

On their testimony the proponent of the will rested his proof in support of its validity, and also of the existence of full mental capacity in the testator at the time of its execution. The burden, therefore, of invalidating the document on the grounds already given now rested on the impugnors. Part of the evidence adduced by them was not particularly pertinent; other portions in relation to details of family matters may also be regarded as irrelevant. It is sufficient for the purpose of showing the character and nature of the particular circumstances regarded by the parties as reasons and grounds warranting their proceedings, to refer to the points in their evidence thus relied on by them.

It is well to observe that of the nine parties thus examined, six were the children of the testator, and consequently interested in the result of the proceedings. Daniel, the executor and sole legatee under the will, was called and examined as a witness for the contestants. It appeared that three years ago, at the instance of his father, he, his wife and children, returned from Canada to reside with him, and lived with him on the most kindly terms up to testator's death in January last; that urged by his father he had written the letter produced, dated in December, 1887, and addressed to his brother William, in Detroit, N. S., requesting to be informed if William would dispose of the part of the house owned by him, and informing him that his father was in a childish state, physically and mentally. At that time his father was debilitated, but became improved, and but for the great weakness from his knees down, his health was perfect; his eye-sight and hearing were good; he managed his own business, and stated at one time that he was 106 years of age. Witness never used any persuasion, threats, or other means to induce his father to make a will. After Mr. Morison had made the will his father had informed him of its contents, otherwise he would not have known what they were. His father was a good reader at one time; was able to write, and did not use glasses.

The other next of kin deposed to the very great age and debility of the testator; that on one occasion, on the visit of

one of the daughters to her mother, the father didn't recognize her, and asked who she was. That he was at that time so childish as to attempt to beat and ill-treat his wife and daughter, not knowing what he was doing. He was always most sober and temperate in his habits. He was, three years before, so debilitated and so decrepid that his daughter, who attended both on him and her mother for fourteen years, was obliged, she deposed, to give him the attention and services one would give to a child.

Another witness deposed that he was absent-minded at times, and would, in the middle of a conversation, drop off to sleep; that Daniel must have obtained and exercised an undue influence over him, otherwise he would not have disposed of his property so contrary to his former dispositions of it; that shortly after Daniel's return the other brothers and sisters discontinued their visits to their father. An instance was given of the old man having forgotten the season of the year, and on one occasion the absence and return of his sons, &c.

It might be stated that each of the next of kin deposed to some incidents or circumstances occurring long previous to the making of this instrument, and these they regarded as evidence of testamentary incapacity. The person who was in the habit of shaving him, before Daniel's return, also considered the old man at times peculiar and wandering in his mind.

Mr. Pittman, counsel for certain next of kin, gave some evidence in relation to Daniel's conduct when about three years ago he (Pittman) was attending, at the instance of Mr. Morison, at Ashley's to have a will executed by the testator, Daniel entered the room and insisted on hearing it read. The witness stated that at that time the old man informed him that he was 103 years old, and conversed with him freely and intelligently; and some time after that, on a second occasion, witness again attended Ashley for a like purpose in company with Mr. Berteau, then a law student in the office of Mr. Morison, and found a very great change in the old man. He informed him he was very deaf, and witness was obliged to read the will loudly to him. In these wills he dealt naturally with his children in the disposition of his property, excepting towards one who he stated was "fractious." Witness deposed, that if necessary and called upon he would have considered it safe to make the usual affidavit in proof of the capacity of testator, and the due execution of that first paper as his last will. It

was while attending at the execution of that will that Daniel, the present executor, intruded and insisted on hearing it read, and from the circumstance he concluded that undue influence may have been exercised by Daniel in the making of the last will.

Mr. Berteau, who had attended the execution of the two previous documents about three years ago, deposed that he would have hesitated before making the usual affidavit in proof of either if called on to do so as the will of the testator. Between the first and second visit a great change had taken place in the testator. He appeared more debilitated and harder of hearing, etc. However, he did not take very particular notice of him, or interest in the matter at the time.

We therefore turn to the will itself, and find it bears date on the 25th day of July, 1889, and by it John Angel and Daniel Ashley are appointed executors. The former subsequently duly renounced, and the latter, the sole legatee, as such executor applied for probate. It appears to have been regularly executed with all due formality, every requirement of the statute having been clearly and carefully complied with.

The gist of the evidence being given, it is as well briefly to refer to a few cases of some analogy in details, but containing the principles that govern in such adjudications. Commencing then with a case making reference to the main elements regarded as necessary to constitute a will, and the requirements to be looked for in a testator, that of *Sefton vs. Sefton*, 1 F. & F 578, may be cited as worthy of reference. Cresswell, C. J., stated *inter alia*, "To make a will the party must have a 'disposing mind,' he must be able to dispose of his property with understanding and reason."

Here is an appropriate extract from a judgment of Chancellor Kent, given in the able judgment of Cockburn, C. J., in the case of *Banks vs. Goodfellow*; it will be found with the observations of the chief justice illustrative of exceptions here taken, and to which some of the evidence was principally directed:— "It is one of the principal consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities, and," adds the chief justice in continuation, "the English law leaves everything to the unfettered discretion of the testator. * * * It is essential to the

exercise of his power that he shall understand the nature of his act and its effects, the extent of the property of which he is disposing, and to appreciate the claims to which he ought to give effect," &c. Again, we find it stated in the same judgment the testator must, in the language of the law, have a sound and disposing mind and memory, &c.; it is not necessary that he should view his will with the eyes of a lawyer—it is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple form. In deciding upon the capacity of the testator to make his will, it is the soundness of his mind and not the particular state of bodily health that is to be attended to; the latter may be in a condition of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. In *Greenwood & Greenwood, 3 Carr, App. 30*, Lord Kenyon, in charging the jury, said, if the testator had power of summoning up his mind, so as to know what his property was, and who those persons were that were the objects of his bounty, then he was competent to make his will. It is enough if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.—*Ws. Exrs. 1, p. 37*.

In the year 1878, a somewhat parallel case appears to have been adjudicated on by this court, and a judgment delivered upholding the will. The testator, named Allen, at the time of making the will was 81 years of age, and several witnesses testified to alleged weakness of mind evidenced as they held by delusions, forgetfulness of the names of persons, friends and places, etc., expressing himself at times incoherently and by silly observations, etc.; one witness had refused to witness the will, doubting as he stated the sanity of the testator. The judgment upheld the will, the learned judge holding that at the time of its execution testator was of full disposing mind and understanding.

Sufficient authority has been cited to afford a clear understanding of the principles and rules observed by courts of law, and applied in their adjudications in cases where these issues arise. With us, unfortunately it may be, a judge or court cannot have the assistance of a jury, as is elsewhere afforded in contestations of this nature. The court must consequently discharge the functions of both judge and jury, and carefully endeavor to arrive at such a conclusion as may be justified under the law, as applied to the facts established in the case.

Is there then sufficient in the evidence, so lengthily given, to convince one that testator at the time of making and executing that instrument as his last will and testament had, in the language of C. J. Creswell, a disposing mind, capable of understanding and forming an independent judgment with respect to what he was doing? This ground of interrogatory must be accepted as covering the first objections made by the contestants. The burden of negating the affirmative position resulting from the *prima facie* case of the propounder rests on the contestants, and in my judgment they have failed in the sufficiency of their proof, the weight of testimony being against their theory of mental incapacity. This is apparent from the initial fact of the regularity of the factum or execution of the will, and throughout the history connected with it. The solicitor does not appear to have any interest in the matter, his impartiality was unquestioned, and freely deposed to the clear, continuous mental capacity of the testator for a length of time preceding and at the making of the will, and subsequently thereto; also to the matured intentions long previously expressed by testator of altering his will, owing to some family disagreement. Corroborative of such testimony we have most disinterested and intelligent persons who involuntarily attended as witnesses, and deposed to the remarkable physical condition of the testator, and in their judgment his unquestioned possession of full mental capacity and functions.

The age of the testator was certainly exceptional and rare in the history of such cases. But it does not follow that incompetency or inability to make a proper disposition of one's property is necessarily consequent on and limited to the attainment of a certain time of life; nor should it hold good in this case certainly, when we find from the evidence of such disinterested parties so long acquainted with him, that testator did not present or show any signs of any of these symptoms of that marked decay of mental power which generally accompanies the attainment of an advanced age. We also find that in November, 1888, when examined as a witness he deposes to his age as that of 96 years, and then his intelligence is said to have elicited favorable notice from the court. It must be observed that the instances detailed by the witnesses of absence of memory, forgetfulness, peculiarities of conduct, so directly opposed to his ordinary disposition and kindly demeanor, were incidents that happened as stated at intervals, and over two years before the making of this instrument. In reference to these the lan-

guage cited in *Constable's case*, 3 *Knapp's Reports*, might be repeated, "It may be determined that all these circumstances were of a transient nature, and occurred when the mind was inactive," &c. These peculiarities do not appear to indicate, according to the evidence, the ordinary character or disposition of the man, and their occurrence is confined to a time long anterior to the execution of the instrument in question.

However peculiar and striking these incidents might have appeared at the time to these parties, we have in the language laid down in authority cited, to consider if the desires and dispositions of the testator, as embodied in his will, suffice to show the genuine and last behests of a rational creature and a free agent. If so, then it must be held to be a good will in point of law.

The instrument admittedly differs from other wills made by him. but that may be readily accounted for, owing partially to his altered feelings and changed relations towards the members of the family. Satisfaction and approval had been generally expressed with the purport of a will made shortly after Daniel's return from Canada, and after the writing of that letter on December 8th, 1887. But at that time family discontents had not culminated in open disputes and litigation. I do not consider much importance should be attached to this letter, beyond the fact of its evidencing the correctness of some statements as to the physically weakened condition of the testator at the time. It was said unless he was of unsound mind he would not have made Daniel his sole legatee. The making of an in-officious will under a normal state of family relations, and the selection of strangers as the objects of one's bounty, might well give rise to such a theory, or might evidence the exercise of undue influence over a testator's mind. But it must be apparent from the evidence that no sufficient material can be found in this case to support the position so assumed. If the testator had the capacity requisite, and was a free agent, the propriety of the disposition would not affect the validity of the will. We must conclude he had that capacity, and find there is no direct evidence impugning the testimony in support of that position.

Now as to the charge or grounds of undue influence. It needs no authority to support the assumption that if such an instrument were obtained by undue influence, it would be vitiated and void in law. In ascertaining the meaning of this formulated charge of undue influence, it will be found solely to include the fraud and coercion alleged in seeking to invali-

date such instrument. We find on this subject the law stated in the case of *Colelough and Boyse and others, H. L. R., 1857*: "Influence to be undue within any rule of law, which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or fraud." And the ruling already referred to as to the burden of proof in support of the position of the impugners, is also strictly to be observed in this particular. Where once it has been proved that a will has been executed with due solemnities, by a person competent and apparently a free agent, the burden of proving it was executed under undue influence rests on the party who alleges it. This must be shown by the impugners.—*Parfit vs. Lawless, L. J. R., 1872*. They must show that such undue influence amounted to force and coercion, destructive of free agency; that the opportunity could not be resisted by the testator. It has even been held that it is not sufficient ground on which to set aside a will, to show that it was made from a mere desire to gratify the wishes of another. The undue influence must be shewn to be the control of another will over a person whose faculties have been so impaired as to submit to the control of such other, the party ceasing to be a free agent, &c.—*Lovett vs. Lovett, F. & F.; Wingrove vs. Wingrove; and In re Tufnell, P. C., 1855*. It was observed that, "It is not sufficient to establish that a person has the power unduly to overbear the will of another. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will was made." Aside then from the direct and positive swearing of Daniel, that he did not use any such influence, we have the equally positive evidence of the solicitor that the testator's instructions were communicated directly to him whilst in attendance alone on the testator for the purpose, and that the will was executed in the presence of the attesting witnesses and no other party or persons; and prior to that testator had desired him to call on him for that purpose. If force, fraud or intimidation had been used, it certainly would have come to the knowledge of some of the witnesses. But it is only by inferences those members of the family who have attested to this matter, consider they are justified in asserting that Daniel must have induced, by some means or influence, the old man to make such a will in his favor. However, there is an absence of proof, and as plausible as such reasonings may appear, the opposite position is too clearly established to be affected by them.

Under all the circumstances, from a review of precedents and a comparison of these analogies found to exist in all such cases, and applying the rulings so delivered to the clear and established facts in evidence here, the court cannot but give effect to the instrument propounded as the last will and testament of the deceased.

In view, however, of the greatly advanced age of the testator, and his physical condition, it is considered the parties were fully warranted in calling on the executor for proof in solemn form of this will; and consequently, counsel for the contesting parties will be allowed their taxed costs out of the estate of testator.

Sir J. S. Winter, Q. C., and Mr. Kent, Q. C., for the executor.

Hon. Mr. Morris and Mr. Pittman for contestants.

TRUSTEES OF O'DEADY *v.* MCLOUGHLAN.

1890, *July*. CARTER, C. J.; PINSENT, J.

Company—Shares—Scrip—Possession of—Assignment of—Non-Registration—Delivery of scrip by assignor—Notice to company—Insolvency of assignor.

An insolvent some years previous to his insolvency had obtained a loan from the defendant, and in consideration thereof gave him an assignment under seal of certain scrip, of shares in a gas company on the understanding that on repayment of loan the shares would revert to him. The scrip was deposited with defendant. The trustees of the insolvent in an action claimed the scrip on the grounds: (1) That the charter of the gas company required the assignment in order to be valid to be registered in the company's books which had not been done; (2) No notice had been given as required by the charter of the company of such transfer; (3) Non-registration under Registration of Deeds' Act.

Held—Trustees in insolvency take no greater estate than that vested in insolvent. Registration of Deeds' Act never contemplated choses in action such as shares in a company but relate to such property only as to which visible and external possession continues in the assignor after assignment.

THIS is an action of detinue to recover possession of a certain scrip or certificate of shares in the St. John's Gas Light Company. The questions between the parties for the decision of the court are raised by a special case, and the facts agreed upon, so far as material, are, that O'Deady being indebted to McLoughlan for sums of money advanced, did in February, 1881

by agreement in writing, assign and transfer as security therefor, with interest at six per cent., by way of mortgage, the said scrip or certificate of shares, and deposited the same with said McLoughlan. O'Deady was declared insolvent in February last, at which time there was a balance due McLoughlan of \$480 50 on account of the said mortgage; the shares in the meantime remaining on the register of the company in the name of O'Deady, who received the dividend and paid the interest, also part of the principal secured by said mortgage. The case admits that on two occasions McLoughlan called at the company's office to notify them of this transaction; and having seen Mr. W. H. Rennie, a clerk in the office of the company, he states that he informed him of the mortgage of the shares in question, that O'Deady had delivered him the certificate thereof, and requested Rennie to make a note of the facts, who replied he would note them in the books of the company; Rennie says, that being informed by McLoughlan of the fact of the mortgage, he merely replied by telling him of the usual steps taken to have shares transferred, and advised him to have the old scrip endorsed, and to send it with the assignment to have a new scrip issued.

I may here mention, the St. John's Gas Company was incorporated by the 7th Vic, cap. 12; by the 9th sec., "shares and accretions are declared to be personal estate, and transmissible as such in accordance with the established rules. Provided that no assignment or transfer of any share, shall be valid or effectual, until such transfer be entered and registered in a book to be kept for that purpose; and provided also, that whenever any stock-holder shall transfer in manner aforesaid, all his stock or shares in the said company to any other person or persons, such stock-holder shall cease to be a member of the said corporation."

At the argument Mr. Browning, for the trustees, contended on various grounds, and cited several cases, that McLoughlan could only claim as a general creditor on the estate of the insolvent, and had no claim or lien on the shares, that there was not sufficient notice given the company of the mortgage security; that the shares were in the order and disposition of the insolvent; and that the English bankruptcy acts, prior to those of 1869 and 1883, in this respect applied, and that the assignment should have been registered under the 22nd section of the Registration of Deeds' Act, 51 Vic., cap. 22, 1888, or the previous act, title 9, cap. 36, con. statutes.

Mr. Kent's, (Q. C.), contention for McLoughlan, is that the local Registration of Deeds' Act does not include mere choses

in action or such like; that no notice was necessary to be given the company, if it were, there was sufficient notice given; and that the English bankruptcy acts had no application—citing several cases.

I shall first observe on the non-registration under the local act referred to, the 22nd section of which requires “that all bills of sale, conveyances and mortgages of personal chattels in this colony, being deeds of gift or wherein the *bona fide* consideration therefor shall exceed the sum of two hundred dollars, and where the actual possession shall continue in the grantee or mortgagor, shall be registered upon payment of fees and proof and deposit as hereinbefore provided; and all such bills of sale, conveyances and mortgages not registered, shall be adjudged fraudulent and void as against a subsequent purchaser or mortgagee for valuable consideration, who shall first register his bill of sale, conveyance or mortgage; and also as against any subsequent and actual attachment or levy, under process of any courts of this island, upon such personal chattels, *and also, against a trustee of an insolvent estate*, or any assignee or trustee under a conveyance for the benefit of creditors.”

For general information I have deemed it advisable to insert this section in extenso, and having given consideration to its terms I think it does not and never was intended to apply to the species of chattel interest denominated choses or things in action, such as shares in a joint stock or incorporated company. Recent decisions, which on another important point in this case I shall have more occasion hereafter to remark upon, may, as regards distinction in chattel interests, be advantageously referred to, such as judgments in the House of Lords, *Whinney vs. the Colonial Bank*, 1886, *Bradford Banking Company vs. Briggs & Co.*, 1887, with reference to the possession, order or disposition clause in the English bankruptcy acts. I am clearly of opinion that the chattels to which our Registration Act has reference means stock in store or shop, furniture, utensils and such like, and does not include “those incorporeal rights which are not visible or tangible, or capable of manual delivery, or of actual enjoyment in possession in its ordinary sense, and which if denied can be enforced only by action or suit” And almost in the same words and of the same effect, an American jurist of repute, writing on personal property, says: “the shares in a railway and other such companies are to be considered a chose in action, not being a thing tangible, of which you can take corporal possession, the scrip or certifi-

cates are merely instruments of title, and are incorporeal,—*Sclyr citing 11 A. & E. 205; 5 Price. 217, 9 res. 17.* In fact this is nothing more than an equitable charge for money payable out of a special or particular fund,—*Row vs. Dawson, 2 W. & T., 726.*"

Besides all such companies have special provisions for transfer, registration and dealing with shares by their incorporation acts, or by the authorized rules and regulations of the company or joint stock association, as in this "St. John's Gas Company." The absence of a sufficient notice to the Gas company of this mortgage or charge is relied upon as fatal to the claim of McLoughlan. Notice of an assignment is not necessary to render it perfect, as between an assignor and assignee, whether it be for valuable consideration or only voluntary,—*See notes Ryall vs. Bowles 2, White & Tudor's leading case, 778; nor is notice necessary as against third parties who simply stand in the same position as the assignor, as for instance, a person claiming under a subsequent assignment, as Volunteers, Ib 778, but priority may be gained if the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or incumbrancer giving notice of his assignment will thereby acquire priority,—Deale vs. Hall 3, Russ. 1, Lovridge vs. Cooper, Ib. 30.* Thus in not perfecting title, by doing all he could to acquire possession, a prior assignee may be postponed to a subsequent purchaser who has given notice. In this case there is no subsequent purchaser, as contemplated in the preceding remarks; and in *Atkinson's trusts, 2 McN. D. G. 140*, it was held that the assignee stands in the place of the insolvent, and takes only such interest as he can give and subject to the equities by which the insolvent is bound, and as a general rule an assignee of a chose in action, other than a bill of exchange or a note, takes it subject to the same equities as it was liable to in the hands of the assignor,—*Smith Eq'y, 13th Ed., p. 277; Fisher on Mortgage, 401, and the cases there cited, pr. Lord Westbury, Ex. p. Stewart 4th, D. G. J. & S. 543; and where notice is required there is no difference between an assignee in bankruptcy and an assignee of the particular thing,—15 Eq., 26, Russell's policy trust.*

It is evident from the mortgage contract it was never intended that the shares should be transferred to McLoughlan. If that were the intention, the particular mode of doing so as prescribed by the company, contained in the certificate in this

case, should have been followed, and which declares that the whole or any number of the shares are transferable by him (O'Deady) only at the office of the said company, by his appearance therein in person or by his sufficient attorney thereto lawfully authorized, and there producing the certificate, unless dispensed with by the directors. The retaining of O'Deady's name on the register was quite compatible with the contract or agreement, and as observed by Lord Ashbourn in the *Colonial Bank vs. Whinney supra*, "Anyone dealing with the bankrupt had no right to assume that they were the owners of the entire interest in the shares until the certificates were either forthcoming or their absence satisfactorily accounted for."—From 21st James I., cap. 19, in the successive bankruptcy acts chattels personal, in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner under such circumstances, that he is the reputed owner thereof (I may here observe the question of reputed ownership is regarded as one of fact); and the latest bankruptcy act of 1883, sub-section three of section forty-four, provides that things in action (such as the shares in this case) shall not be deemed goods (a word which by the interpretation clause of the act, unless the context otherwise requires, includes "All chattels personal") within the meaning of this section. The object of these enactments was to prevent traders from gaining a delusive credit by a false appearance of substance, as remarked by Lord Hardwicke in *Ryall vs. Bowles supra*, the principal case on this subject. In Whinney's case *supra*, a registered shareholder in an incorporated company deposited with his bank his share certificates, together with a blank transfer executed by himself, as security for advances by the bank. Upon each certificate was a note that in the event of sale or transmission, the certificate must be surrendered with the deed of transfer before the transfer could be registered or a new certificate issued. The shareholder became bankrupt before the company received any notice of the deposit; held, reversing the decision of the court of appeal (*30 C. D.*, 26), that having regard to the note upon the certificate the shares were not in the possession, order or disposition of the shareholder under such circumstances, that he was the reputed owner thereof within the meaning of the section and sub-section referred to; held, also reversing the decision of the court of appeal, that the shares were "things in action" within the meaning of the proviso in that sub-section. As in that so in the present case,

McLoughlan had an equitable interest only, and O'Deady had the right of redemption, as observed by Lord Blackburn in *Whinney's case*, *The Soci t  G n rale De Paris vs. Walker*, *H. L. 11, Appeal Cases 20*; as also the latest case of the *Bradford Banking Company vs. Briggs & Co*, *supra*, confirm this ruling.

In claims arising from insolvency we have our local act, since the 5 Geo. IV., c. 67, to guide us, and that does not contain anything to militate against the foregoing established principles. The provisions of the English bankruptcy acts have not been made applicable to our insolvency proceedings, but assuming they had been, it has been shewn that even with their strictness the deposit e of shares for valuable consideration in a company (such as the St. John's Gas Company) has his right of lien recognized. I am therefore of opinion the defendant is entitled to the judgment of the court in his favor for the admitted amount and interest, upon payment of which and costs of action, the trustees will be entitled to the shares. With the view I have taken it is unnecessary to pronounce upon the sufficiency of the notice to the company, but I may add that upon the consideration of several cases, I am inclined to think it would have been sufficient. This case, rather an important one in principle, was ably argued on both sides, and nothing was omitted in support of the respective contentions.

HON. MR. JUSTICE PINSENT:

* * * * *

Now, there can be no question that unless the statute law shall, as a matter of policy to meet special circumstances, and for ethical considerations, have made other express provision, trustees in insolvency or assignees in bankruptcy can take no greater interest in an estate than was vested in the insolvent or bankrupt himself. What he possessed or would be entitled to, vests in and devolves upon them and nothing more nor less, and thus it was held by Lord Westbury, *ex parte Stewart*, that the general rule in bankruptcy was that the assignee took the property of the bankrupt subject to the equities which affected it in his hands.

If, prior to the vesting order in insolvency, O'Deady had sued MacLoughlan for recovery of this scrip, while it was under assignment and upon deposit with the defendant for an amount unpaid, it is clear that the action must have failed, and its result would have been quite unaffected by the fact that the

transfer of shares had not been completed in the Gas Company's books, or that the company had or had not received notice of transfer and deposit.

Our law regulating insolvency contains no provision altering, upon the happening of insolvency, the status of the parties in this respect.

A number of English cases in bankruptcy has been cited, and the bankruptcy law contains a "reputed ownership" clause, providing that the property divisible amongst a bankrupt's creditors shall comprise—

"All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Notwithstanding this clause it is held in the latest and now governing case (*The Colonial Bank v. Whinney*, 11, App. Cases, House of Lords, A. D. 1886), that a deposit of share certificates (the owner still remaining registered in the books of the company) was not affected by this enactment so as to deprive the bank of its claim and lien for advances; that although such shares are personal chattels they are not "goods" within the meaning of the section, but that they are "things in action" within the meaning of the proviso; and that the clause relates to property or goods of which the bankrupt has the visible and external possession, order or disposition.

In this case Lord Blackburn, in his judgment, says: "I think that the owner of chattels personal, not passing by delivery, though he can create a good equitable title in a pledgee for the purpose of securing a debt, may still continue to be reputed owner of the whole property."

It is also held in this case that the question was unaffected by the consideration of notice to the company in which the shares were held, so as this court holds the same in the present case, it is unnecessary to determine whether if this were a case requiring a notice, that given to the clerk of the company here would have been sufficient.

I now arrive at the chief difficulty attending the determination of this claim, and that is the language of the "Registration of Deeds Act," section 22.

I am, however, of opinion, that, although the term "personal chattels" is used, that the chattels contemplated by the statute

are such as are equivalent to "goods" under the Bankruptcy Acts; that these provisions of the Registration Act relate to property of which visible and external possession, as for instance, in the case of stock in trade, continues to be held by the assignor after assignment.

Moreover, in this case the only thing tangible and capable of passing into actual possession, viz., the scrip or evidence of title in the shares was not only assigned to, but actually did at the time pass into the possession of the defendant, and has remained with him to this day; that, therefore, such a case is not within the terms of the statute nor within the mischief intended to be remedied by it.

The conclusion at which I arrive is that a good equitable title in the shares, and a right of lien upon the scrip or certificate of shares in his possession passed to and continue to exist in the defendant (MacLoughlan), and that before he can be compelled to deliver the scrip to the trustees of O'Deady's insolvent estate, he is entitled to be paid the balance due to him for principal and interest, with the costs of these proceedings.

Mr. Browning for plaintiff.

Mr. Kent, Q. C., for defendant.

MOORE *v.* POWER.

1890, *October*. HON. MR. JUSTICE LITTLE.

Gift—Inter vivos—Setting aside.

The defendant, with whom a servant (his sister-in-law) lived for a great number of years, deposited without her knowledge in a savings bank in her name a sum of money, receiving a bank-book in her name. The book was delivered to the servant on the day of deposit, and retained by her for three years, though nothing was drawn on it. At the end of that time she gave it back to defendant for safe keeping, and was retained by him until her decease, which happened some short time after. It was contended that the giving back of the book revested the money in the donor. On petition of trustee for direction of court,—

Held—That there was a good gift *inter vivos*. That defendant exercised acts of ownership over the gift; that there was a clear intention expressed by donor to give, and an actual handing over of the *indicia* of the property and a parting with the fund, and no restoration in the donor.

THE proceedings in this matter originated in the filing of a petition by the administrator, under the Trustee's Act of 1878, setting out certain matters in relation to a sum of money appearing on deposit to the credit of the estate in the Newfoundland Savings' Bank, and praying for directions as to its application. Evidence was taken under an order of court in proof of the statements so made, and subsequently a petition was filed on the equity side of the court by the plaintiffs, praying that these monies might be declared to be part of the assets of said estate, and distributed among the next of kin of intestate. The questions having been regularly raised under the equity proceedings and the parties at issue, it was agreed to adopt the evidence so taken, and to submit these contentions on argument for the judgment of the court.

In order to obtain a consecutive history of the principal grounds relied on by the respective parties, reference must be made somewhat in detail to the facts thus given in evidence. It appears then from the testimony of the parties that the defendant (James Power) is now over ninety years of age, and although physically suffering from the ailments incident to old age, his mental faculties and senses are not markedly impaired. He was the brother-in-law of the intestate, who died in Nov., 1888, at the age of about sixty-seven years; she came to the country about fifty-six years ago and from that time up to her death lived with the administrator. His wife (sister of intestate) died over thirty years ago, leaving six children. The intestate appears to have been treated and regarded as one of the family, and to have devoted herself to their care and interest during this long period of time. The administrator deposed, "That from the time of Mrs. Power's death, the intestate with my daughters managed my house, and after the marriage of my daughters she had full control," but her position was not that of one serving under an agreement for wages or other remuneration. She received all she required for her comfort and use, and lived in amity with the family to the last. Under these circumstances the administrator, without the knowledge at the time of the intestate, or any previous understanding or arrangement touching the matter, and quite voluntarily on his part, in the year 1884, deposited a sum of one thousand dollars of his own money in the Newfoundland Savings' Bank in the name and to the credit of the said Bridget Tobin; receiving from the bank, in accordance with the invariable rule and practice of the institution, a bank-book in her name, with the amount set

out to her credit. She knew nothing of it until the delivery of the book to her by his daughter, who at his instance and by his directions, delivered it to her on the day of the deposit. The intestate retained the book in her possession for three years, and might have drawn the whole amount at any time she wished. After that lapse of time the administrator deposes, that on an occasion "he told her to be careful of the book, and to remember that any person who held possession of it could draw the money," and she thereupon went to her box, got the book and gave it to him, observing "it is your money and will go back to you, and you take care of it." He then took and retained the book, and nothing further was said in reference to it. She had no other money or property of any kind, and died suddenly leaving no testamentary disposition of this money or bank-book.

Proof was given by the defendant that other monies, called by him "trust monies," belonging to other members of his family, had been deposited by him to the credit of this same account in the bank, but these she had drawn out and paid over to the parties entitled, at defendant's instance. According to the statement of Mr. Knight (the accountant), amounts had been paid into the credit of this account and drawn out from time to time, but he could not say by whom, with the exception of a payment made by him to Miss Tobin herself, in Aug., 1888; the amount then drawn by her was transferred to another account, and subsequently shew drew another amount from her account, leaving with current interest a balance of \$1076.81 at the end of the year 1888 to the credit of that account. The account at the bank still remains in the name of the intestate.

Under this state of facts the contentions of the parties may be resolved into the simple question, Whether the money so appropriated to the credit of the intestate became, under the data assigned, absolutely vested in her as her property? and if so, did the subsequent conduct of the parties at any time operate as a rescinding of the arrangement and a revesting of the fund in the original donor? In the first place, it must be observed the circumstances indicate a clear intention on the part of the donor to give the money so deposited to the donee for her own sole and absolute use, freed at the time from any apparent condition. Whether this intention arose from a sense of duty, or in recognition of an obligation for past services rendered in his own household or business affairs, does not positively or directly

appear in proof. However, it may be inferred he was actuated by the laudable desire to make some provision for her that might be available in after years, when that support she had received from him would of necessity be no longer afforded her. The practical outcome, however, of the intention was the deposit of the amount, the setting of it apart, and the delivery of the bankbook to her as the *indicia* of her right of property in and to it. She certainly accepted the gift and exercised acts of ownership over it, by drawing from it occasionally at her own apparent discretion.

Now, to such plain and limited facts and circumstances it is obviously unnecessary to draw to any very great extent on legal authority in order to satisfactorily answer the first part of the inquiry covering the ground referred to, whether under the rules of law and equity the fund became the unqualified property of the donee. We may then for this purpose apply to the facts in evidence the principles collected in the following ruling of Mr. Justice Maule as pretty determinate of the right and legal status of the parties so far. "The question to be determined is not whether there has been an actual handing over of the property manually, but whether, looking at all the surrounding circumstances of the case, and particularly at the value and character of the chattel or article proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and on the part of the recipient to receive and act upon such gift. If, however, such a case arises, that is the basis, I am confident of the decision of a court of common law, and of course the same result would follow in a court of equity."—*Extracted from the judgment in the case of Laun vs. Thompson, 1 C. B. 379.* We have only to apply each part of the foregoing to the separate and particular incidents in this case, to realize the applicability of the law as there laid down, to the satisfactory determination of the claims of these litigants.

In effect the facts in this case leave no room for inferences to be drawn from circumstances in order to bring it clearly within the full meaning of the principles of the law. There was here an actual handing over of the *indicia* of the property as well as the parting with the fund, and an expressed intention to give accompanying the giving, and a clear acceptance of the so termed gift by the donee.

We find, also, in a case where the circumstances were not so clear or the facts so strongly declaratory of the intentions of

the parties, that where deposits of money in a Savings' Bank were in the name of the donor, the delivery of the bank book, with intent so expressed to give the donee the deposits represented therein, was held, in the court of first instance, to vest in the donee an equitable title to the deposits. However, there is much more in the present case than would suffice to clearly take it out of the category of equitable assignments. We cannot overlook the fact that a case involving some of the principles raised here was the subject of adjudication in this court in the year 1878. It related to the distribution of the assets of the estate of Thomas and Mary Spracklin. Among the papers of the latter party was found a Savings' Bank book, containing an account in her name of a deposit of money in the bank to her credit. There was no direct extrinsic evidence showing the deposit to have been made by her, and the executor of the husband, Thomas, claimed it as part of the assets of his testator's estate. The court held otherwise, and in the judgment the Chief Justice observed, *inter alia*, "had no question arisen as to the legal or equitable right of parties interested in the estates of husband and wife, there was nothing unperformed to make the deposits or investments complete in compliance with the rules, or to restrain the bank from payment to the wife on the presentment of the book."

It is unnecessary here to repeat what was done to perfect this transfer of the deposit or investment, and the repeated recognition on the part of the bank, of the right of the donee as the person for whom the deposit was made.

The answer may then be completely supplied to our query that both at law and in equity, from the law as applied to the facts in evidence, it would appear to be a complete gift, transfer or handing over of that amount of money so deposited to the intestate at the time for her sole and absolute property.

The gift, if it may so be termed, having completely vested in the donee, continued to be in her possession for over three years, when, it is urged, she parted with it, and it is contended that the return of the bank book to the donor, under the circumstances, with the accompanying expressions or desires of the donee, are sufficient to warrant us in concluding there was a restoration of the fund to the donor. This, it is further urged, was in accordance with the original intention of the parties. But this proposition is unsupported by the weight of testimony.

The evidence accepted as literally correct, might place the

original donor in the position of a bailee, on receiving the book, as stated, from Miss Tobin. As he deposes, that after warning her of the risk she was subject to if the book fell into other hands, she stated, in giving it back to him, "It is your money, and it will go back to you, so you take care of it." He therefore states, he took charge of it. The most favorable meaning to be applied to this language, under the circumstances, is that she believed the book would be safer in his custody, and it might be that in the event of her death the money would revert to him, may have been intended. Recognizing, however, the difference in their ages, and the probabilities of survivorship being in favor of the donee, and the use she is clearly proved to have made subsequently of the book, this theory is not as substantial as it at first appeared. The fact of Miss Tobin having presented the book at the bank, and obtained money on it subsequently to this occurrence, too strongly outweighs the supposition that she had at the time divested herself of her right to the fund, or parted with the right to or the full possession of the book.

It is clear she still retained dominion over both the fund and the book, and we cannot infer there was any such restoration of either, as that contended for in this position of the case.

The evidence of the administrator is given as the expression of what he believes to be the intentions mutually actuating the parties at the time. If the death of intestate had not occurred so prematurely it may be presumed some disposition or settlement of the money would have been made in keeping with their intentions, and probably this fund would have been preserved to those naturally entitled to participate in its distribution, and towards whom the intestate had held the position of parent or guardian for so many years.

However, as the case now stands we are constrained to decide in favor of the next of kin, and adjudge the fund to be the assets of the estate of the intestate. All costs and disbursements of the administrator on account of intestate to form a first charge on it.

Mr. Scott, Q. C., for petitioner.

Mr. F. Morris, for M. Power, a nephew of intestate.

Mr. Kent, Q. C., for the administrator.

1890, *September*. HON. MR. JUSTICE LITTLE.

Bait licensing Act, 1887—Right to exact fee for license when not expressly stated in Act—Pecuniary penalty—Alternative penalty of imprisonment—Imprisonment in default of payment.

Under the provisions of the Newfoundland Bait Act, 1889, a license was granted to one Dominick Pincello, a United States' fisherman, to purchase bait fishes in Newfoundland waters, in consideration of his paying one dollar per ton on his vessel's tonnage. A complaint having been made before a magistrate that Pincello had on board schooner more bait than the quantity allowed by the license, the magistrate adjudged the master guilty of a breach of the said Act and fined him one hundred dollars, or, in default, three months' imprisonment, and confiscated and sold his vessel.

Held—On appeal; no authority under Act to impose a charge or tax as was done in the present case, or authority to receive a money consideration for the privilege conceded; statutes imposing duties are to be construed as not making any instruments liable to them unless manifestly within the meaning of the legislature; if words be not found in the taxing Act the tax cannot be imposed;

Held—Also that the judgment was defective in that the magistrate inflicted the accumulated penalties prescribed, there being no such power in the Act.

THE interposition of this court has been invoked on an appeal entered at the instance of Dominick Pincello to set aside a certain conviction or judgment pronounced against him by James Hippisley, Esq., a stipendiary magistrate, in a prosecution and trial had before him, and instituted by and at the suit of James F. McGrath, Esq., a commissioner or superintendent of the bait protection service, for an alleged breach by the appellant of the provisions of the Colonial Act 52 Vic., cap. 6, entitled "An Act to amend and consolidate the laws relating to the exportation and sale of bait fishes."

At the late session of the court at Harbor Briton the matters involved in the appeal were fully and ably argued by counsel, both on the part of the appellant and the prosecution.

The facts and history of the proceedings may be set out in a very brief compass. As a matter of course we are confined in relation to them to the record alone, at present no new or extrinsic matter could be imported into the case or added to what was presented on the record as it came from the inferior tribunal.

The initial act in the proceedings comprises in itself the substantial grounds of the charge on which the prosecution was based. This is the sworn complaint of the prosecutor, and is as follows:—

NEWFOUNDLAND.

FORTUNE BAY, }
 S. S. *Fiona*, }
 To wit :

The complaint and information of James McGrath, superintendent bait protection service, taken on oath, who saith : This morning, near Dantzic Point, I boarded the American schooner *Howard Holbrook*, of Gloucester, and found that she had on board about one hundred barrels of herring for exportation—more than the quantity allowed by the license held by the master. I pray a warrant for the master of said vessel, Dominick Pincello, for breach of the Bait Act, 1889.

Sworn to on the first day of May, 1890.

J. HIPPISEY, Stipendiary Magistrate.

On this complaint a warrant was issued and the appellant was brought from his vessel (the *Howard Holbrook*) on board the government steamer *Fiona*, then on the fishery protection service, having on board Mr. Hippisley, stipendiary magistrate, and Mr. McGrath, the commissioner.

The evidence thereupon adduced, and on which the conviction rests, was that of the complainant, who deposed "that he went on board the *Howard Holbrook* yesterday (May 1st); he found a large quantity of herring on board; the master shewed him a license; 92 barrels was on the license; there were over 192 barrels. He asked the captain where his iced bait was; he denied having any iced, and said the ice on deck (about a ton) was to ice the loose herring; he searched the vessel and found 60 or 80 barrels iced; no doubt on his mind but the herring were for exportation."

John Murphy and John Power, two of the superintendent's staff, corroborated these statements; the former deposing that he believed there were altogether 250 barrels; and the latter, there were 200 barrels on board, besides what was iced.

The license was in evidence, came up as part of the record, and is of the purport following:

LICENSE TO FISHING VESSELS TO PURCHASE BAIT FISHES.

Dominick Pincello, of the fishing vessel *Howard Holbrook*, 92 tons register, of Gloucester, having paid to the undersigned sub-collector at the port of St. Jacques, the sum of ninety-two dollars, the privilege is hereby granted to said vessel to enter the bays and harbors of Newfoundland, for the purchase of ninety-two barrels of bait fishes, and such quantity of ice, lines and other supplies as may be required.

Dated this 30th day of April, A. D. 1890.

(Signed),

R. BOND, Colonial Secretary.

CHARLES CLINTON,

Customs Officer at the Port of St. Jacques.

This license has also written across it the words, "Cancelled April 30th, 1890. Ninety-two barrels. Sgd., George Snelgrove."

This comprised the whole of the evidence against the appellant. We then have his own sworn statement, taken at the trial when called on for his defence. He deposed that "the officer (Snelgrove) came on board and asked him for his license and light receipt, and if he knew how much he was entitled to. He (the captain) said yes; he told him he was entitled to ninety-two barrels; he put the men to work and the officer was watching; it was about dark when the men were through." The deponent then stated, "I mean to say and swear that George Snelgrove gave me all the herring I have got on board. I believe there are more; I know that ninety-two barrels was the quantity allowed me; I remember saying I had two hundred and ten barrels."

Now this is the evidence in its entirety on which judgment was pronounced, and a written conviction in the terms following was duly entered, and forms the subject matter of this appeal:

NEWFOUNDLAND.

FORTUNE BAY,
S. S. *Fiona*,
To wit: }

In re McGrath vs. Pincello.

Be it remembered, etc., * * * * Dominick Pincello, master of the schooner *Howard Holbrook*, of Gloucester, U. S., hereafter called the defendant, is convicted before me the undersigned, one of her Majesty's stipendiary magistrates for Newfoundland, for that he, the said defendant, on the first day of May instant at Fortune Bay, in Newfoundland aforesaid, to wit, near Dantzic Point in said bay, did unlawfully commit a breach of the first section of the Bait Act of 1889, by having in his possession on board his said vessel, for the purpose of exportation, a large quantity of herring over and above the *quantity allowed* by the license granted him, and *contrary to the said Bait Act*: And I do adjudge that the said defendant, for his said offence, *do pay* a fine of five hundred dollars, *or in default* be imprisoned in her Majesty's jail at Harbor Briton for three months; do forfeit the penal amount of his bond and also his license, and that the said vessel, the *Howard Holbrook*, on board of which said herring have been found to have been unlawfully shipped, with the herring so taken in violation of the provisions of the said Bait Act, shall be confiscated and sold.

Given, etc., etc.

(Signed), JAMES HIPPLISLEY, [L. S.]
Stipendiary Magistrate for Newfoundland.

Under and by force of this judgment, it would appear that the captain was detained, and the vessel and her cargo remained in charge of the officers of the law until the 9th day of May, when after the notice of appeal, provided for under the statute,

had been given, and a deposit of five thousand dollars made on behalf of the appellant, by way of security, to abide the result of the final decision of the court of appeal, the appellant, with his vessel, was relieved from restraint.

Under the peculiar, but not altogether unprecedented, circumstances attending the trial of such a case before a court, held on board ship, and the consequent inability of an accused party being supplied with such legal advice or assistance as might enable him, at the time, fully to avail of the right of appeal, he appears to have been obliged to telegraph to the American consul at Saint John's, with the result that I. R. McNeily, Esquire, as solicitor for the appellant, transmitted to the magistrate a notice of appeal, setting out succinctly, but vaguely, the following as the grounds of exception, on which he relied. They are stated to be:—1st. That the judgment was contrary to evidence, and the weight of evidence and contrary to law; 2nd, The absence of a material witness; 3rd, That the finding was in derogation of treaty rights, and alleged the want of jurisdiction.

In the first place contended by appellant's counsel that the provisions of the act were not applicable to foreigners, or intended to affect them in the prosecution of their fisheries, particularly where these were secured to them under treaty rights, as for instance under the convention of 1818.

That, as it was a statute of a criminal character its provisions should be strictly construed and in favor of the subject; therefore, there being no proof of the magistrate being such, his commission not having been produced, this tribunal could not recognize the official or magisterial authority assumed by him; that, as there was no proof of a proclamation having been issued in pursuance of the terms of the fourth section of the act, and no authority existed for the issuing of a license, the appellant was not limited as to the quantity of bait fishes he might take under his license, and no criminal intention was shown or should be inferred against defendant. In consequence of the failure of the magistrate to take bonds for the prosecution of this appeal, as directed by the act, the proceedings were a nullity on appeal.

The counsel further excepted to the form of the conviction, it being contrary to the terms and letter of section 10, and cannot now be amended; no power in the committing magistrate to impose such alternative punishments conjunctively as one conviction.

The fact of exportation was not supported by the evidence;

there was also an absence of any proof as to where the seizure was effected. Counsel referred to the several sections of the act and the alleged non-compliance with their provisions. The trial should have been held at the nearest place where the court was to be holden, &c. These and other exceptions were taken and forcibly argued, and the following authorities cited in support of the contentions against the prosecution and conviction.—*11 A. & E., p. 379; Wilberforce on Sts., p. 55; 2 Cooper, 524; L. R. 32 B. D.; 1 Salth, 348; Mar. on Stats., p. 73 and 239; 4 B. & S., 94; 2 Price, &c., and others.*

In support of the conviction the counsel, on behalf of the Crown, relied in their argument in reply on the sufficiency of the conviction. The 10th section conferred an option on the magistrate to impose, in addition to the fine, the other penalties; and as its operation was cumulative and the word "or" meant and was intended to mean more than giving an alternative power to the magistrate. As long as there are substantial grounds to convince the court that the conviction has been in accordance with the meaning and intent of the act, it should be sustained. The party was charged with having bait on board for exportation, and having bait for which he had no license; the vessel was within the headlands of the bay, and Dantzic Point is a well marked headland as appears by reference to any official map. Foreigners were as amenable under such circumstances as British subjects to the municipal and police laws of the colony. The conditions on the license were fully authorised and must have been well known and understood by the party receiving it. By the 20th section no proceedings under the act can be impeached or set aside for a defect or want of form. That the admissions of the accused were sufficient in themselves to support the charge of the infringement of his having a large quantity of bait in excess of what he was legally entitled to, and was in the act of exporting it. Learned counsel at length commented on all the exceptions taken and arguments advanced, and urged that no advantage could now be taken by the appellant for a non-observance of the steps prescribed by the act to perfect bonds, &c., to enable him to make this appeal, inasmuch as these omissions were at his own instance and for his convenience and advantage at the time.

It would appear that this appellant, the master of an American fishing vessel or banker, in the prosecution of his voyage, put into the harbor of St. Jacques, in fortune Bay, on our southern coast, for a supply of herrings for bait purposes, and

under the law existing, by force of this Act, it became necessary for him to observe a certain formula in making an application for a license to enable him to take or purchase the herring or bait fishes so required. In the first place the applicant is required, by the fifth section of the act, to set out in an affidavit the name of the person to whom the license is to be granted, the purpose for which the bait fishes are intended to be conveyed or exported, and other matters. No such affidavit accompanied this record, nor has such been referred to in these proceedings. If it were here it would be of importance for many reasons, and particularly to show the name of the intended licensee, because the bond next required to be given, as directed by the seventh section of the act, and to be executed by the master of the vessel and two sufficient sureties that the terms of the license would be complied with, presents the name or signature of "Pincelli Dominique," and not the name of "Dominick Pincello," as master, as one of the obligees signing the same. So much for the absence of that care and particularity which should have been officially observed if the matter were regarded of moment or importance in the fulfilment of the requirements of the act. This bond, although bearing three signatures, has only two seals affixed, and executed in this perfunctory manner was accepted by the official and now appears as part of this record.

On these preliminary steps being taken, the license, already given in full, was, it is stated, granted to the master, Dominick Pincelli, on the 31st day of April last.

This document purports to have emanated from the highest official, governmental or ministerial authority, and apparently so by virtue of the terms of section three of the act. This section directs "That no such license (that is, the licenses referred to in the fifth sub-section to section one, and those to be granted under the second section of the act), shall be issued, except under the authority of the Governor in council, and countersigned by the Colonial Secretary."

The same form, conditions and terms appear to have been observed in all such licenses granted to similar applicants for the like privileges. The license expressly limits the quantity of herring to which the licensee is entitled to have or take, at that time, on board his vessel, and, for the privilege so granted, a charge, it would appear, of one dollar per ton on his vessel's tonnage was imposed; this was paid by him to the customs' officer by whom the license was issued or delivered.

After a careful perusal of the act and the history of the legislation leading up to its enactment, which is a repeal also of the two previous acts on the same subject, one is at a loss to discover any intention on the part of the legislature, or any provision or language in the act, either expressly or inferentially, authorizing the imposition of a charge, tax, or duty of the nature or character of that exacted in these cases.

There does not appear to be in this act, and it is the only governing and operating legal authority on the subject, any power or right conferred on the crown or its officials to exact or receive a monied consideration for the privileges intended to be conceded.

The subject hardly calls for references. It is sufficient to say that to attempt to establish such a rule, however desirable it might be on grounds of public policy, it could only be accomplished through legislative action. It is well laid down that statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the meaning of the legislature.

And if a statute professes to impose a charge upon the public, it is absolutely necessary that "its language should be plain and unambiguous."—*Has'le on Stats* Express language in statutes is absolutely indispensable for imposing a tax or charge. Lord Cairns observes in *Cox vs. Rabbits*, *L. R. 3 App. C.*—a taxing act must be construed strictly, you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed.

Before finally leaving this part of the grounds urged on appeal, it may be opportune to observe that, although it was optional with the applicant to accept a license, and the payment of the fee might be regarded as voluntary, still when a criminal prosecution is instituted for a breach of the provisions of the statute and terms of the license, the matter unquestionably assumes a very different phase. From this *license fee* or *tonnage charge*, we next turn to the quantity of bait fishes permitted to be taken under the license.

And in regard to it the act does make provision for such a purpose, and it would therefore be quite within the intention and express terms of the act so to prescribe and limit licensees in the exercise of the privileges so granted. It is under and by virtue of the authority given in the fourth section that such a power is vested in the Crown. This section is to the following purport and effect: "The Governor in Council may from

time to time by proclamation suspend or limit the operation of this act, and the issue of licenses thereunder, in relation to any district or part of the colony, &c., and for such period and in relation to sale or exportation to such places and '*in such quantities*' as shall appear expedient, and as shall be declared and defined in the proclamation." Now it appeared admittedly, and as a matter of fact, no such proclamation as provided for in this section, or in relation to the limitation to quantities, was ever issued.

The intention of the legislature is clearly apparent and easily gathered from the language of that section.

It was rightly considered that if it became necessary to make any change from the issuing of ordinary to special licenses, due publicity by proclamation should be given to the public of such intention, so that those interested might have notice of such change in the execution and operation of the provisions of the act.

In no other section is any reference made or authority given for the granting of a license in such terms.

It is true the fifth section prescribes that the forms of the licenses, affidavits and bonds shall be prescribed by the Governor in council; but it would be futile to argue that substantive and substantial matters, either in variance of or in addition to the powers expressly conferred by the act, could be at all properly assumed under that section.

It is noteworthy that this fifth section is in all other respects a transcript of the seventh section of the repealed act of 1888, and these words "and in such quantities" had no place at all in the section of the repealed act. As it was therefore expressly required that a proclamation should issue under the provisions of the fourth section to give them effect, and in order to make them operative, and no proclamation having been issued, and no other part of the act authorizes the issuing of licenses for limited quantities of bait fishes, it is clear there was no present right or power to issue a license containing any such condition or limitation. The appellant then having been charged with having a larger quantity of herring on board for exportation than allowed by his license, is convicted, and in the written conviction such charge is repeated. I will, therefore, turn to that judgment, and find in like manner it is defective, and under the authorities to be cited such defects are so serious as to render it bad and of no effect.

The punitive part of the conviction runs as follows: "And I

do adjudge that the said defendant, for his said offence do pay a fine of five hundred dollars, "*or in default,*" be imprisoned in her Majesty's gaol at Harbor Briton for three months, do forfeit the penal amount of his bond, and also his license, and that the said vessel, on board of which said herring have been *unlawfully* shipped, with the herrings so taken, &c, shall be confiscated and sold.

These penalties are sought to be imposed by force and virtue of the terms of section nine of the act and its sub-section three, which are as follows:—"Any person who shall violate any of the provisions of section one of this act, or any of the sub-sections thereof, or, &c., shall be liable for every first offence to a penalty not exceeding \$1 000, 'or' imprisonment for a period not exceeding twelve months"; and by and under the tenth section it is further enacted "That in addition to the punishment provided by the foregoing section the convicting magistrate may order the confiscation and sales of the herring, &c., taken, conveyed, or exported in violation of the provisions of the act or the terms of the license 'or' of the boat or vessel on board of which such bait fishes shall be found to have been unlawfully shipped," &c.

We have here in one judgment the infliction of the accumulated penalties prescribed by these different sections, and that is alleged to be in harmony with the intention of the legislature, and in accordance with the meaning of the language employed in these sections. To ascertain what was intended it is of interest to refer to the express language of the previous acts which this is said to consolidate. By the fifth section of the act of 1887, it is enacted that any person guilty of a violation of its provisions shall be liable to a fine of \$1,000, "and," *in default* of payment of any such penalty, to imprisonment for, &c., &c.; and by the sixth section of the act of 1888 it is provided that any person having obtained a license &c., and violated its terms shall be liable to the same penalties as are provided in the previous act, "and," *in addition* to such penalties, to a forfeiture of the license.

I again find in the fourteenth section of this act, conferring on the commissioner, &c, power to oblige the master, &c., of a vessel to heave-to, &c., and to board and examine, and if the party omits to heave-to, or obstructs those boarding, &c., he will be subject to a penalty of \$500, "or" to imprisonment, &c.

Realising then the fact that in this particular the amended act thus omits the word "and," as expressed in the previous

enactments in connection with the penalties imposed, and substitutes the alternative "or," we cannot but feel convinced as to what was the intention of the legislature. It may have been felt that the powers to inflict such penalties were too absolute and plenary in prosecutions so far-reaching in their consequences under such a summary jurisdiction. The worthy magistrate was evidently desirous from abundant caution to fully secure by his conviction what he must have considered a just indemnity from the defendant for what was adjudged a gross infringement of the provisions of the statute. But in doing so he inadvertently went outside the letter and spirit of the act. He was empowered to inflict the penalty of five hundred dollars or the imprisonment for three months, and could have elected either punishment, but after inflicting the first he adds words omitted designedly by the legislature from this statute, and makes it a condition "that in default" of payment of such fine, the defendant shall be imprisoned, &c., and imports the word "and" in connection with two other penalties where the statute uses the word "or." Upon this subject of substitution of "and" for "or" in somewhat analogous convictions, we find it laid down at page 536 in *Stroud Judl Dry*, "That the power given to justices by section three, Licensing Act (Imperial), to inflict a fine 'or' to imprison, is in the alternative; and "or" is not to be read "or in default of payment of the fine"; therefore a conviction imposing a fine, or, in default of payment, imprisonment is bad."—*Re Brown, L. J. N. C. 108, 32 B. D. 545.*

It is true this change of the words has been occasionally used in civil cases, particularly in equity proceedings, but there is no general rule even in such instances for sanctioning such a departure. Wherever (it is further stated) such a construction is adopted, there must be some violence done to the language which only a context can justify.

In the case of *re-Brown, 3 L. R., 2 B. D., 547*, where the penalty for a breach of the Imperial License Act, 1872, was a fine of £50, or imprisonment, the justices subsequently finding the person unable to pay the fine applied the terms of another section of the act to enable them to import into the conviction the operation of the latter section, whereby they considered they were warranted in imposing imprisonment "in default of payment." But Cockburn, C. J., and Miller, J., concurred in ordering the party to be discharged, holding "the conviction bad, as there was expressly given in the statute, the alternative

in the first instance." Acting on the language, "and in default of payment," thus substituted for the word "or," it would appear as if the party were punished for the non-payment of a fine as well as for the offence of which he was convicted.

Again, it will be found in a judgment of Jessels, M. R., delivered in *re Morgan v. Thomas*, 9 L. R., 2 B. D., that the attempt to transform "or" for "and" is also referred to as follows: "You will find it stated in some cases that "or" means "and," but "or" never does mean "and" unless there is a context which shews it is used for "and" by mistake, &c. There is obviously no mistake committed here, because not only of the context but of the use of the word in substitution for "and" as used in the preceding acts. Moreover, in construing this language we cannot lose sight of the fact of this being a penal statute creating a new jurisdiction; consequently therefore, it must in its terms and language be construed strictly." No calamity would be greater than to introduce a lax or elastic construction of a criminal statute to serve a special "but a temporary purpose."—*per Pollock, C. B.* This rule is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature and not in the judicial department, &c.—*Hurle on Stats.*, p. 249. And we find in *re Hartly Quintain vs. Hooper*, 2 Cp. p. 523, where a special jurisdiction is given by statute it must be strictly followed, it being a special jurisdiction out of the course of the common law.

Clearly then the express words of this most important part of the act should not have been departed from, or an interpolation of other words unintentionally adopted, the result being fatal to the decision and conviction arrived at.

Much of the remaining ground of appeal would call for no very extended observation, even if the matters already passed on were insufficient to justify the court in setting aside the decision of the magisterial tribunal. For instance, in relation to the exception taken to the constitution of the court and the place of trial, I find the court was regularly constituted and the commission and appointment of the magistrate duly made and promulgated through the *Royal Gazette*, of which judicial notice was taken. The place of trial was certainly more convenient and suitable than would Burin be under the circumstances. As to the asserted claim for exemption under treaty rights, it is perfectly evident the vessel when seized was in waters where Americans or other foreigners possess no such

rights. As to the contention that it was not shown that she was within that three-mile zone, over which maritime jurisdiction or power might be exercised by our officers, it must certainly be observed there is an absence of particularity in the testimony of the witnesses in locating Point Dantzic, and in defining, even approximately, the distance of the vessel from the land when so boarded.

The positive and uncontradicted swearing of the accused that the officer of the revenue who cancelled his license was present during the delivery of the herring bait, called for more consideration than it apparently received; but the magistrate has properly considered that, even if the excess in quantity had been received with the acquiescence of the official issuing or cancelling the license, that would not have exonerated the licensee from liability. It was stated also at the argument that the quantity of bait so taken was ascertained and counted by the dory load, and not measured by the barrel. This mode of acting, coupled with a subsequent mere guessing or estimating, on view, as to the quantity of bait fishes found on board a licensed vessel boarded by our officers, might naturally lead to serious contentions, resulting in litigation and loss. However, these matters do not now call for further notice in this judgment, and it is equally unnecessary to observe that no attention can here be given to what may have been urged at the argument in relation to the policy or otherwise of having such a law. Consideration has been confined alone to the matters appearing on the record, and the observations and references directly bearing on them. The judgment, therefore, must be in support of this appeal, and in reversal of the conviction of the magisterial tribunal. The question of costs is reserved for further consideration.

Mr. T. J. Murphy, crown officer, and *Messrs. E. D. Shea* and *Clift* for the prosecutor.

Messrs. I. R. McNeily, M. Carty and *H. R. Hayward* for the appellant.

1891, February. HON. MR. JUSTICE PINSENT, D.C.L.

Principal and agent—Master and servant—Supplier—Receiver of voyage—Lobster fishery—Insolvency—Appeal.

The plaintiff was a shipped servant to one Savage in the lobster fishery. At the end of the fishing season Savage was unable to pay the amount of wages agreed upon by reason of the failure of the fishery, and the plaintiff looked to the defendant for his wages, on the grounds that he was the principal in the business and Savage merely his agent; that he was the receiver of the voyage, the supplier of Savage, and that Savage being insolvent he was liable.

Held— (Affirming the Court below on appeal)—That the defendant was not the contracting party, and could not be held liable; that Savage was proprietor of the business, and there was no agency. It was doubtful if the defendant could be held liable in such a business, under any circumstances, for Savage's contracts, even to the extent of the "voyage" received.

THIS was an action in the Central District Court before Judge Conroy to recover the sum of \$32.40, a balance alleged to be due from the defendant to the plaintiff for wages arising upon an agreement in the lobster fishery, under which the plaintiff was to receive as wages \$20 per month and a bonus per hundred of lobsters.

The agreement was in writing, and was made between one John Savage, as the employer, and the plaintiff, as his employé. It was signed by both Savage and the plaintiff. It was drawn up in Portugal Cove, where both parties resided, and it was witnessed in writing by the constable of the place. It bears date the 12th May, 1890.

The position which the plaintiff now takes is that the defendant Monroe was the principal in the lobster factory business, and that Savage was only his agent, and that as the lobster fishery of the past season at Portugal Cove failed, with the result that Savage was unable to pay the wages of those whom he employed to catch lobsters, the plaintiff is entitled to look to the present defendant for the balance found at the close of the season to be due to him under his written agreement with Savage.

The court below found for the defendant upon the ground that he was not the party contracting with the plaintiff, and that Savage was the proprietor of the business and the principal, and not the agent of the defendant.

While I deeply regret that the result of the past season's lobster fishing operations at Portugal Cove should have resulted so unfortunately that the proceeds were unequal to the dis-

charge of the liabilities of the venture, I am unable to discover where the right of the plaintiff lies to seek indemnification for this misfortune at the hands of the defendant.

The questions are those of fact; and in any case the finding of the court below should have been erroneous to the extent of being irrationally unjust before this court would undertake to interfere with it.

On the contrary it appears to us that no other judgment could have been reasonably rendered, and only to the ingenuity and commendable zeal of the counsel for the plaintiff and for other parties standing in like position with him, can I attribute the fact that the case comes before this court on appeal.

I do not think it is at all likely that if Savage had proved to be a person of adequate means to respond to the claims, while Monroe was the reverse, that the latter would have been found in the position of a defendant at the suit of these claimants.

It is unnecessary at this time and in this place to enter into details. The judgment of the judge of the court below is in writing and has been published, and this court has had the benefit of its perusal.

It is sufficient to say that it sets out a case perfectly consistent with the facts and carrying conviction upon its face.

The present defendant was simply in the position of a creditor and supplier of Savage, and no act of his was otherwise than consistent with that position and with a prudent regard to his own interests.

He seems to have admitted the position that as a supplier and receiver of the voyage he would be liable to account for its proceeds to the operatives in the venture.

It is open to doubt whether in such a business as this, and under such an agreement, the defendant would under any circumstances have been legally liable, personally, to meet to any extent the contracts of Savage with the persons with whom he had contracted; but assuming that in the event of the insolvency of the supplied he would be liable as a supplying merchant receiving "the voyage," the fact is that here he has voluntarily paid out upon the orders of Savage \$1,500 in wages, as against \$1,150 received by him as the value of lobsters returned to him and packed in the cans which he supplied, Savage being in debt to him upon the whole transaction in the sum of \$2,200.

The judgment of the court below must be affirmed and the appeal dismissed.

The chief justice observed that he had been unable to be present at the argument, but he had given consideration to the case and fully concurred in the judgment just delivered, as the only one which could be properly arrived at.

Hon. Mr. Morris and Mr. Greene, Q. C., for the plaintiff.

Sir J. S. Winter, Q. C., and Mr. Morison for the defendant.

MUNICIPAL COUNCIL v. STABB.

1891, *February*. HON. MR. JUSTICE PINSENT, D.C.L.

*Municipal authority—Control of side-walk—Power to modify material used in same
—Action for cost of laying down side-walk.*

Under the municipal law the "proprietor" of each house was liable to lay down a side-walk of stone or plank in front of same. The defendant not having complied with the law, the Council laid down a block pavement. The defendant contended that his tenant was liable under his lease, and under the law, and that the law does not call for a block pavement, and that the Council has no remedy in the present action.

Held—That the defendant is the "proprietor" within the meaning of the law, and was liable; that it is within the province of the Council to modify and alter the material to be used in the construction of a side-walk. The Council has no power to lay down a side-walk and sue for cost of same. The remedy is by indictment for non-repair, or action for the penalty.

THIS is a special case stated for the opinion of this court.

The question is that of the defendants' liability to repay the Municipal Council a sum expended by them in laying a block pavement on the side-walk upon the north side of Water street, opposite land and premises of which the defendant is proprietor and William Cooke is tenant under a lease for twenty years.

The lease is not a building lease, but it contains a covenant by the lessee to repair, and another for the payment of all taxes, impositions and assessments to which the landlord may be made subject by law.

The points raised are two: (1) Is the defendant the person under legal obligation to lay the pavement? (2) Is he bound to pay more than the cost of a plank pavement?

The Municipal Council is a body in the nature of a corporation for the city of St. John's, constituted under an act of the legislature, passed in 1888.

Its duties relate to an improved system of sewerage, the improvement, repairs and maintenance of streets, sidewalks and drains; the lighting of the town, and sanitary and other purposes; the management and control of the affairs of the late General Water company, of Bannerman Park, and other works and purposes.

It is here unnecessary to refer to the boundaries within which the powers and responsibilities of the council arise, as there is no question that the locality with regard to which this contest is raised is within them.

It is enacted that within those limits and in relation to these matters the council shall exercise the functions recently discharged by the Board of Works, by the Governor in Council, and the Surveyor General, and by the General Water company, with certain other provisions of general application for the execution of the purposes of the corporation.

In June last the council made a demand upon the defendant to construct a pavement of fir or juniper blocks upon the sidewalk upon which the tenant Cooke's house abuts, in accordance with a rule made by the council.

The defendant declined to construct the pavement, and the council proceeded to do so, incurring for that purpose an expense of \$41.80.

There had up to that time been no pavement of any kind laid in that place.

The cost of a block pavement is more than that of ordinary plank, but less than that of stone, and the block pavement is said to be very much more durable and suitable than either.

The St. John's Rebuilding Act (Consolidated Statutes, cap. 80) provides that "on each side of Water street and of Duckworth street, the paths appropriated for the use of foot-passengers shall be ten feet wide, and shall be covered with plank or stone to that extent by the *proprietor of each house* abutting on the said streets along the front of such house or building."

By the same act the Governor in Council may, amongst other things, "regulate and adjust the levels and widths of all foot-paths or side-walks."

The Municipal Regulations Act (Con. Stat., cap. 79) provides that "Any person who shall not keep in good condition and repair the stone or plank pavement or causeway opposite to

his land, dwelling-house, stores or other buildings, shall for every offence forfeit and pay a penalty not exceeding \$25, and the chairman of the board of works may cause the same to be repaired and amended, and shall thereupon be entitled to recover from the owner or occupier of such land, dwelling-house, store or other building, before any stipendiary justice in a summary manner the expenses incurred in such reparation or amendment, with costs of suit."

Under the act of 1888 the Municipal Council was empowered to make such rules and regulations as might be deemed expedient or necessary, for amongst other matters, "regulating in regard to drainage the plans, inclination and materials of the pavement and roadway of public and private streets."

The Council, by virtue of the powers vested in it by the act of 1888, passed "regulations for the side-walks in Water street," declaring that they shall be ten feet wide on the south side thereof, and nine feet wide on the north side, and that "where they are not laid down with sound good flags, they shall be laid with sound fir, spruce, or juniper blocks, of such size and quality as may be approved by the town engineer."

To revert to the St. John's Rebuilding Act (Con. Stat., cap. 80) it will be seen that under sect. 28, "Any person infringing the provisions of this chapter, or any order made by the Governor in Council, shall be subject and liable to a penalty not exceeding \$50, to be recovered in a summary way," &c.

It thus appears plain that the "proprietor of each house abutting," &c., (sect. 15) in not having laid the pavement required by law, infringed the provisions of that chapter and became liable to a penalty of \$50; but if the application of the 28th section to that case is open to any doubt, then the party neglecting a duty imposed by statute would, where the act is silent as to the penalty, be liable to an indictment at common law.

The question then arises, is the defendant the person liable under the statutes to lay the pavement in question? Is he the "proprietor" under the "St. John's Rebuilding Act"? Is he an "owner" under the "Municipal Regulations Act"?

I am clearly of opinion that a person in the position of the defendant here is the "proprietor." He is the lessor, and the landlord and the owner of the house, as well as of the land. It is immaterial as between the town council and the defendant what covenants there may be between him and his lessee, and whether such covenants are applicable to this case, or to what extent they may be valid and binding between the lessor and the lessee.

But it is said that if he is the liable party, the law specifies only the laying of plank or stone pavements, not pavements of wood-blocks.

I am of opinion that it was within the province of the council, in the exercise of their powers of improvement and of their express statutory power of prescribing the "materials of the pavement and roadway," to modify and alter the kind of material to be used; that they were not strictly limited to the directions of the old acts. The very object of their existence is improvement and amendment, and adaptation to new conditions.

There is no question upon the point that a great improvement has been effected by the new regulations, and at a cost to proprietors considerably less than the expense of stone flags.

It seems most unreasonable that any question should be raised by the owners of property in opposition to this beneficial change.

However, this court has to determine whether they are liable in the particular mode adopted by the council for its indemnification; *i. e.*, whether the council can sue for and recover the expense incurred by them in laying down a pavement which the owner of the subject premises has declined or neglected to construct.

If this were a case of *the repair of a pavement* already laid down, the case would be clear enough. (See the old Municipal Regulations' Act already quoted).

With regard to the original *laying down* of pavements no similar powers exist. The breach of that duty comes under the St. John's Re-building Act, and, as I have observed, is the subject of summary proceeding for a fine or of indictment.

It is a pity that the law, with regard to the liability of laying a pavement, is not similar to that prescribed for the neglect of repairs. The point is well worthy the attention of the legislature.

In the meantime I would suggest—what are owners to gain who, as in this case, are asked to indemnify the council to the extent of \$41.80, when they have laid themselves open to indictment, or at least to a penalty of \$50 for breach of their statutory duty.

That duty now is to lay pavements of either "flags" or "blocks" of the prescribed kind.

It must be held that while it is open to the council to take other proceedings under the various enactments regulating their powers, the particular mode of proceeding, reasonable as it is, adopted by the council in this case for the recovery of

the cost to the town of this pavement cannot be sustained, but in view of the whole case the defendant must go without costs.

Mr. R. McNeily and Hon. E. Morris for plaintiff council.

Sir J. S. Winter, Q. C., and Mr. Morison, for defendant.

BAIRD ET AL v. WALKER. *

1891, *March*. CARTER, C. J.; PINSENT, J.

Prerogative—Treaties—Interference with private rights—Acts of state.

Quere—Whether the Crown has the power of compelling its subjects to obey the provisions of a treaty, made either for the purpose of putting an end to war or to preserve peace, or whether interference with private rights can be authorized other than by the legislature; where the government justified certain acts in derogation of the private rights of the plaintiffs, in regard to their lobster fishery, as acts and matters of state arising out of political relations between Her Majesty the Queen of England and the French Government, contending that they involved the construction of treaties and of a temporary *modus vivendi* for lobster fishing in Newfoundland, and other acts of state, and that they were matters that could not be enquired into by the courts.

Held—That this defence disclosed no answer to the action.

THIS case was argued in the February sittings on points of law which were set down for argument upon the motion of the plaintiffs' counsel unopposed.

The claim of the plaintiffs (Jas. Baird and Edward Le Roux) for the recovery of damages is, that the defendant (Sir Baldwin Walker), on or about the twenty-fifth day of June last past, wrongfully entered the plaintiffs' messuage and premises, situate at Fishel's river, Bay St. George, and took possession of plaintiffs' lobster factory and of a large quantity of gear, materials and implements appertaining to and then being in and about the said lobster factory, and kept possession of the same for a long time, and prevented the plaintiffs from carrying on the business of catching and preserving lobsters at and about the said factory, and still holds and retains possession of the said factory and prevents the plaintiffs from carrying on the said business. Claim for damages, \$5,000.

* The defendant in this case appealed to the Privy Council, where the judgment of the Newfoundland Court was sustained. (For judgment of Privy Council *vide* appendix, page 13).

The defendant, in defence, says: He is the captain of Her Majesty's ship *Emerald* and the senior officer of the ships of Her Majesty the Queen employed during the now current season on the Newfoundland fisheries; that to him as such senior officer and captain was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishery in Newfoundland during the said season, which as an act and matter of state and public policy had been, by Her Majesty, entered into with the government of the Republic of France; that the said agreement provided amongst other things that on the coast of Newfoundland where the French enjoy rights of fishery conferred by the treaties no lobster factories which were not in operation on the first day of July, 1889, should be permitted unless by the joint consent of the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs being situate on the said part of the coast of Newfoundland, and being one which was not in operation on the said first day of July, 1889, and one which was without the consent aforesaid, being used and worked by the plaintiffs as a lobster factory during the season ensuing upon the making of the said agreement and whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant, in the performance of his duties towards such care and charge, did, for the cause aforesaid, at or about the date stated in the statement of claim in this action, and after notice to the said plaintiffs of his intention so to do, enter into and take possession of the messuage and premises in the said statement of claim mentioned, and did also, for the same cause, then take possession of certain gear, materials and implements which were then in and about the said factory; but defendant avers that the said gear, materials and implements were subsequently, at the request of the said plaintiffs and before the commencement of these proceedings, delivered up to them; that such entry and taking possession of said messuage and premises, and such taking possession of the said gear, materials and implements are the grievances and matters complained of in the said statement of claim, and were made and done by the defendant in his public political capacity and in the exercise of the powers and authorities, and in the performance of the duties of the care and charge so as aforesaid committed to him, and were acts

and matters of state done and performed under the provisions of the said *modus vivendi*. That the action so as aforesaid taken by defendant in putting in force the provisions of the said *modus vivendi* has, with the full knowledge of all the circumstances and events which occurred in relation thereto, been approved and confirmed by Her Majesty as such act and matter of state and public policy and as being in accordance with the instructions of Her Majesty's government. And defendant, therefore, submits that the matters set forth in this his answer to the said statement of claim, and on which he rests his right to enter into and take possession of the said messuage and premises and to take possession of the said gear, materials and implements were acts and matters of state arising out of the political relations between Her Majesty the Queen and the government of the Republic of France; that they involve the construction of the treaties and of the said *modus vivendi* and other other acts of state, and are matters which cannot be enquired into by this honourable Court.

The plaintiffs object that the defence does not set forth any sufficient answer or ground of defence to the action, and, among other things, for the following reasons:—

1. That it does not appear that the scope of defendant's authority and duty in relation to the Newfoundland fisheries extended to and included the control of the operation of Lobster factories.

2. That the alleged agreement or *modus vivendi* was not in law binding or obligatory upon the plaintiffs and that the alleged contravention thereof by the operation of the said factory was not unlawful.

3. That the alleged contravention of said agreement or *modus vivendi* afforded no justification in law for the action of the defendant.

4. That the said action of the defendant was not an act of state and public policy.

5. That the alleged authority from Her Majesty, and subsequent confirmation by her, afford no justification for the action of the defendant.

6. That the said alleged authority and subsequent confirmation by Her Majesty do not take away the authority and jurisdiction of this honourable Court to enquire into and adjudicate upon the said acts of the defendant.

In limine, speaking for myself, I think it would have been more satisfactory if all the circumstances surrounding this im-

portant matter had been fully before the court, and that we were not confined in the application of the law to the statements in the pleadings now presented to us for adjudication.

As for the purposes of this proceeding the allegations in the pleadings are to be regarded as admitted; the claim of the plaintiffs shews a wrong committed by the defendant towards the plaintiffs for which they would be entitled to the redress sought; and the question is whether the defendant has shewn by his defence that he was by law empowered and justified in what he did by the command and subsequent approval of Her Majesty as an act of state in the manner set forth by him, and, if that be so, then the alleged wrongful or tortious act would not be actionable, and the court would have no further authority to entertain this suit.

Sir James Winter, Q. C., for the plaintiffs, stated that the plaintiffs' reply was on matters of fact which the argument did not touch, and matters of law, and chiefly in the first instance, dealt with the three concluding points:—4th. That the action of the defendant was not an act of state; 5th. That the alleged authority from Her Majesty and subsequent confirmation by her affords no justification for the action of the defendant; and 6th. That the alleged authority from and subsequent confirmation by her Majesty do not take away the authority and jurisdiction of this court to enquire into and adjudicate upon the said acts of the defendant. Afterwards, on a question raised, Sir James argued generally on prerogative right as affording no justification in answer to the action.

Mr. Greene, Q. C., followed on the same side, confining his argument to the act of state as affording no justification in law to the defendant, referring to *Damodhar Gordham vs. Deoram-Kaugi*, 1 App. cas. 332, and the *Parlement Belge*, 5 P. D. 93.

Mr. Kent, Q. C., for the defendant, contended that it was the inherent and absolute right of the Sovereign to make treaties or conventions such as the alleged *modus vivendi* set out in the defence, which were binding on all subjects, and that it and the act of state sufficiently justified the acts of the defendant captain of Her Majesty's ship the *Emerald*, who was specially commissioned by superior authority to put in force and give effect to the arrangement between the nations embodied in the *modus vivendi* with respect to lobster factories on a part of the coast of this island where the French enjoy rights of fishery conferred by treaties; and that, upon the grounds set out in the plea of defendant as acts of state, this court cannot further enquire.

Sir W. V. Whiteway, Her Majesty's attorney general, supported the contention of Mr. Kent, and relied on *Buron vs. Denman*, 2, Ex., 167; *Rustomjee vs. The Queen*, L. R., 2 B. D., 69; also *Conway vs. Gray*, 10 E., 36, as authorities in justification of the defendant. The attorney general also stated that whatever may be the final result of this case, enquiry would be made and Her Majesty's government would compensate for loss shewn to have been sustained. Both Sir James Winter and Mr. Kent cited numerous cases and from eminent text writers on constitutional and international law in support of their respective contentions, to the more important of which I shall hereafter refer.

In reference to the general character of actions before our local courts this case presents rather novel features; but, aided as we have been by the industry and arguments of counsel on both sides, we have had the opportunity of considering the bearing of the many cases referred to with general principles in arriving at a decision. We have the satisfaction of knowing that if we err here there is a superior court open to either side to make appeal for correction.

There was no reference throughout the arguments on either side to treaties existing between the nations beyond what appears in the plea of the defendant respecting the object of the *modus vivendi*, and there is nothing in that specifying their nature and character or to point to any particular treaties of which the court could take notice, if any of them could have a bearing on the respective positions and contentions of the parties. Both sides studiously avoided any reference to them, and the argument proceeded on the abstract question of the nature and efficacy in law of an act of state and prerogative right in relation to the allegations in the pleadings. It is admitted for the purposes of this argument that there was an infraction by the plaintiffs of the *modus vivendi* arrangement, in the operation of a lobster factory without the required consent, which operation commenced after the time limited therefor.

There can be no doubt of the Sovereign's prerogative as to the making of treaties, leagues and alliances with foreign States and Princes, and they are binding upon the high contracting parties, and upon the nations concerned; but there is a distinction as to treaties of peace, which are binding upon the nations even to the extent of the alienation of the vested rights of subjects. For the power to make treaties of peace must be co-extensive with all the exigencies of the nation. All treaties made by the competent power become of absolute efficacy, because

they are the supreme law of the land, (*Kent's Int Law* [Aldy.] 383, *Wheaton* 367, 2 *Step. Com* 490).

It has been laid down by one of the most eminent of American jurists, the late Chief Justice Chase, in the case of *Ware vs. Hylton* (3 *Dall.* 199-245, *Am. Rept.*), that it is a "clear principle of national law that private rights might be sacrificed by treaty to secure the public safety, though the government would be bound to make compensation and indemnity to the individuals whose right had thus been surrendered. The power to alienate, and the duty to make compensation, are both laid down by Grotius in equally explicit terms."

But the present *modus vivendi* arrangement, which would appear to be a convention subsidiary to other treaties not before the court, was not entered into because of any hostility between the nations, and stands upon a different footing from treaties of peace, as regards the constitutional rights of the subject. One prime constitutional right of the subject is the enjoyment of private property, without molestation or undue interference. "An essential principle of the law of England is that the subject hath undoubted property in his goods and possessions, and therefore our customary law is not more solicitous of anything than to preserve the property of the subject from the inundation of the prerogative."—(*Broom Con. Law* [2nd ed.] 223, *Plowden Com.* 487, *Com. Dig. Prerogative.*)

The leading case relied upon by the defendant in support of his position is that of *Buron vs. Denman*, 2 *Exch.* 167 & 10 *L. T.*, 523. In this case the plaintiff, who was a Spaniard, and not a subject of the Queen, was lawfully possessed of slaves on the West Coast of Africa. The defendant was captain of a man-of-war who had proceeded to the Gallinas to release two British subjects there detained as slaves. He then concluded a treaty with the native king for the abolition of the slave trade in his country, and, in execution of the treaty, fired the plaintiff's premises, and carried away and released his slaves. The defendant's proceedings were afterwards approved of by his government. The case was tried at bar before *Parke, Alderson, Rolfe and Platt, B.B.*, and it was held (*Parke, B., dubitante*) that the ratification of the defendant's act by his government made it an act of state, for which no action could be maintained.

In the case of *Feather vs. The Queen*, 6 *B. and S.* 296, it was held by the court that the case of *Buron vs. Denman*, which was cited in support, only showed that when an act injurious to a foreigner, and which might otherwise afford a ground of

action is done by a British subject and the act is adopted by the government of his country, it becomes the act of the state, and the private right of action becomes merged in the international question which arises between our government and the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money vs. Leach*, 3 Bur., 1742, and the cases of *Sutton vs. Johnstone in error*, 1 T. R., 493, and *Sutherland vs. Murray*, 1 T. R., 538, there cited, are direct authorities that an action will lie for a tortious act, notwithstanding it may have had the sanction of the highest authority in the state. But, in the opinion of the court, "no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the crown, a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the crown on the one hand, and the rights and liberties of the subject on the other."

In the present case we have necessarily to inquire as to what is an "act of state," and as to how far such an act could be regarded as a justification of the defendant. Mr. Kent referred to *Brown's Law Dictionary*, where it is stated to be the act of a sovereign or of a sovereign body, citing *Buron vs. Denman*. In Sir James Stephen's *History of the Criminal Law* (II. p. 61), he says that he understands it to be "an act injurious to the property of some person who is not at the time of that act the subject of Her Majesty, which act is done by any representative of Her Majesty's authority, civil or military, and which is previously sanctioned or subsequently ratified by Her Majesty"; and he further observes that "the doctrine as to acts of state can apply only to acts which affect foreigners and which are done by the orders or with the ratification of the sovereign; and in such cases even if a wrong had been done it is a wrong for which no municipal court could afford a remedy. They cannot be examined into by the courts of the state which does them. As between the sovereign and his subjects there can be no such thing as an 'act of state.'"

As regards acts of state as thus defined it is observed by *Pollock* (*Torts* p. 73, *Am. Ed.*), that "our courts of justice profess themselves not competent to discuss acts of these kinds, for reasons thus expressed by the judicial committee of the privy council. 'The transactions of independent states between

each other' (and with subjects of other states) are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make." A series of decisions of the Indian supreme courts and the privy council have applied this rule to the dealings of the East India company with native states and with the property of native princes." *Doss vs. Secretary of State for India*, 19, Eq. 509, and *Secretary of State for India vs. Kamachee Boye Sahaba*, 13 Moo. P. C. 22, 75).

In the case of *Tobin vs. The Queen* which was a proceeding on account of the destruction by a captain of one of Her Majesty's ships of an innocent vessel as a vessel engaged in the slave trade, on petition of right by the owners, chief justice Erle, in the judgment of the court states, "The maxim of 'the King can do no wrong' is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally the law presumes will not be wrong; that which the sovereign does by command to his servants cannot be a wrong in the sovereign, because if the command is unlawful it is in law no command; and the servant is responsible for the unlawful act, the same as if there had been no command," and the learned chief justice refers to *Hale P. C. 43*, and other authorities in support of this position.

In *Rogers vs. Rajendro Dutt* (13 Moo. P. C. 236), it is stated in the judgment of the privy council with reference to the action of the defendant (who was the appellant) that it did not seem to them to conclude the question "that the act complained of is to be considered as the act of the government, and that in the part which the defendant took in it, he acted only as the officer of the government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own spontaneous and unauthorized, or whether it was done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration."

It is to be assumed in this case from the pleadings that the plaintiffs were legally in possession of their property, the subject of the alleged trespass, and entitled to its enjoyment; and it was incumbent upon the defendant to show a justification in law for the act complained of. And we may inquire if any possible authority can be found for an officer of the crown, although acting under the orders of the superior power, without the sanction of a statute of the Imperial parliament, or of the legislature of this country, to trespass upon and seize the property of others in like case with the plaintiffs in this cause, in contravention of the dicta and decisions before referred to.

The case of *Buron vs. Denman* has been quoted broadly enough to sustain the position of the defendant; and the statement of its general principles, as abstracted in some text books is very misleading; but when examined more closely, however correct that judgment may be with regard to the special facts and circumstances of that case, it would clearly appear not to be applicable to the circumstances of the present case where the rights of British subjects are involved as against a servant of the crown, though acting under the order and with the approval of the crown.

Captain Sir Baldwin Walker did no more than his duty in obeying the instructions which he had received, and had no alternative but to obey the mandate of Her Majesty conveyed through her responsible ministers. If we were aware of the undisclosed circumstances surrounding this *modus vivendi*, it would be safe to infer that Her Majesty's ministers believed that there were good reasons of state for entering into such a convention, and that such would be for the national welfare, but such reasons of state should not in our courts over-ride the rights of individual subjects.

I have not thought it necessary to review a number of cases and references used in argument, nor to comment upon all the points therein raised.

After full consideration I am of opinion that the plaintiffs are entitled to the judgment of this court upon the point raised on the pleadings, with liberty to amend the pleadings upon payment of costs, if they should deem it advisable to do so.

HON. MR. JUSTICE PINSENT:

For the plaintiffs it is contended that no such thing is known to the law or to the constitution as an act of state by which in

time of peace the crown can convey authority to a public officer or any other person, to commit any act in violation or disturbance of the person or property of the subject, so as to exclude the subject from resort to the Queen's courts of law for redress and compensation for injuries committed under colour of the authority of such act of state.

This position is contested by the other side, and it is contended that the mere fact of such an agreement having been made, as that here alleged to have been entered into between the government of Great Britain and that of the republic of France is in itself sufficient evidence of such public necessity as will justify the sacrifice of the right of private property to the public weal, and particularly where it is alleged that such sacrifice is required in relation to pre-existing treaties. In other words, that the agreement in this case termed the *modus vivendi* is equivalent to a treaty, to the terms of which rights of private property may be subordinated.

It is not averred in the pleadings that the object of the agreement was to avert hostilities between the contracting states, and we have no historic ground for the assumption that war was imminent. There is no question that the *modus vivendi* was entered into and that the acts of the defendant were committed at a time of actual peace, which still continues. The term "*modus vivendi*," in itself supposes an actual state of tranquility, and a desire on the part of the high contracting parties to secure its continuance.

The question then for us is this—Is there sufficient before us to enable the court to uphold this agreement with the right claimed by the defendant of putting it in execution with legal impunity.

A good deal has been said upon the meaning of the expression "act of state."

In the broad sense of the term many lawful acts of the executive government, and many instances of the exercise of the prerogative of the crown might be designated "acts of state"; but there is a narrower sense, and that in which the term is more technically if not exclusively employed, which relates to acts done or adopted by the ruling powers of independent states, in their political and sovereign capacity, particularly "an act injurious to the person or to the property of some person who is not at the time of that act a subject of her Majesty; which act is done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned or subse-

quently ratified by her Majesty"; (*Stephen's History of the Criminal Law*).

With regard to such acts, the general principle of law is that "the transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." (*Sec. of State for India vs. Kamachec*, 13, *Moore, P. C. 75*).

That was the case of a seizure made by the British government, acting as a sovereign power through its delegate the East India company, of the property of a native independent sovereign. "Of the propriety or justice of that act," said the privy council, "neither the court below nor the judicial committee have the means of forming, or the right of expressing, if they had formed any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their lordships cannot enter. It is sufficient to say that even if a wrong had been done, it is a wrong for which no municipal court of justice can afford a remedy."

The contention of the plaintiffs, citing this amongst other cases is, that where the municipal law can be put in force there can be no ouster of the jurisdiction of the courts: and it is argued by their counsel that the doctrine as we find it laid down in *Stephen's History of the Criminal Law* is sound and irrefutable. That learned author, after referring to the case above cited, proceeds:—

"In order to avoid misconception it is necessary to observe that the doctrine as to acts of state can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of state. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it, unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But, as between British subjects and foreigners, the orders of the crown justify what they command so far as British courts of justice are concerned. In regard to civil rights this, as I have shown, has been established by express and solemn decision." Again it is said, "That no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the

consent of the subject, given expressly or implicitly through Parliament, is "*jus indigenæ*," an old home-born right, declared to be law by divers statutes of the realm."

Much other of the text-learning relating to the prerogative of the crown has been discussed in the course of this argument, and the necessity of "preserving the property of the subject from the inundation of the prerogative"; but, while for obvious and all sufficient reasons of convenience and security the personal inviolability of the sovereign is insured by the constitution, it is plain and not open to question that the prerogative itself is the creature of the constitution and is defined and limited by law, beyond the boundaries of which it cannot pass without subjecting the advisers and servants of the crown to answer in courts of justice to other subjects aggrieved by the unlawful exercise of the sovereign will.

The point for decision here is: Was the act within the lawful power of the crown? Was the authority under which the defendant justifies within the province of the prerogative?

The powers of the crown to cede British territory to a foreign state by treaty of peace, following upon the termination of war, seems to be unimpeachable, and has not been questioned at the bar; but it is said that this *modus vivendi* is not of that nature, that it does not partake of the character of a treaty, and that if it does no power resides in the British sovereign of entering into a compact with a foreign state in time of peace for a cession of territory, or *a fortiori* for alienating the property of a subject or of imposing upon him conditions of tenure in derogation of his ordinary rights, while he remains a subject of the Queen inhabiting British territory.

Upon the question of the prerogative right of territorial cession in time of peace, it was held by the high court of Bombay in the year 1876, in the case of *Damodhar Gordhan vs. Deorain Kanji*, that it was beyond the power of the British crown, without the concurrence of the Imperial parliament, to make any cession of territory within the jurisdiction of any of the British courts in India in time of peace, to a foreign power. Lord Selborne, in delivering the judgment of the privy council on appeal, observed that their lordships of the judicial committee "having arrived at the conclusion that the present appeal ought to fail without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the high court of Bombay, as to be unable to advise her Majesty to rest her decision on that ground."

There are manifestly some cases, as where the grant of money is involved, in which the assent of parliament to any treaty is practically essential. There are others involving the cession of territory in the time of peace which require the moral support of the nation as being acts of prudence and necessity, and free from the suspicion of fraud, collusion, or criminal weakness; but nevertheless, as in the acquisition of territory, so *ex converso*, in its cession the treaty-making power is in the crown of Great Britain. Upon the argument of the case last cited, it was suggested that if cessions in time of peace were legal, the crown might cede any portion of territory, say Dover or the Isle of Wight to a foreign power; to which it was most aptly answered by *Stephen, Q. C.*, "The possible extreme abuse of a power is no argument against its existence; you get beyond the tacit terms of a principle when you assume its capricious application." So much for the principles of international, as distinguished from constitutional and municipal law.

With regard to the form of the instrument, it appears to me to be a matter of indifference so long as the terms are clear and sufficiently expressed; and that its construction would be determined simply by the principles which govern other contracts.

It has been suggested that the exercise of the prerogative in possessions enjoying responsible (or constitutional) government is of a more limited character than it would be in the mother country, but where the objects of its application correspond, there can be no doubt, in my opinion, that the sovereign authority in the colonies is the same as it is in Great Britain, where in truth "responsible government" is more amply and absolutely enjoyed than it is in the colonies themselves.

"There can be no doubt the Queen's prerogative is as extensive, valid and effectual in New South Wales as in this county of Middlesex," observed Vice Chancellor Bacon, in *re Bateman's Trusts*, 42 *L. J. N. S.* 554.

For the defendant it is, as I have said, contended that the fact of a *modus vivendi* having been concluded is sufficient without reference to the specific treaties or any provisions of the treaties upon which it is said to be founded, that the *modus* was in itself a treaty, and that the sovereign possesses absolute power to enter into an international agreement of this kind so as to bind the entire community and every individual subject's right; that parliamentary impeachment is the only mode in which its propriety can be called in question, and that if the defendant had failed to fulfil the duty cast upon him by the state, the

nation would have been held responsible by the other contracting power for his want of action; that as the terms upon which peace is made are in the absolute discretion of the sovereign, so the right to enter into an agreement to maintain peace and prevent war is equally so.

Counsel for the defendant, after citing several text authorities upon international law, and referring to many decided cases, say that they rely particularly for the position they assume upon *Buron v. Denman*, 2 *Exch.*, 157; *Conway v. Gray*, 10 *East*, T R. 536, and *Rustomjee v. The Queen*, 2 Q. B. Div. 74.

The first named of these cases was one in which the plaintiff (a Spaniard) sought to recover from the defendant (a British naval commander) damages for taking possession of a barracoon belonging to the plaintiff and carrying away and liberating his slaves. The defendant had instructions to suppress the slave trade, but the authority of which, without further instructions, he would have been possessed under the terms of the treaty with Spain would have extended only to the stopping of ships on the high seas. The action of the defendant was, however, confirmed and ratified by the English government, and it was held that this subsequent ratification was equal to a prior command, and that the defendant was not amenable in a British court of justice at the suit of the plaintiff, because the act of the defendant, whether originally authorized or afterwards ratified, was an "act of state."

In the second of the cases cited, *Conway v. Gray*, in which the plaintiff, although a British subject, sued under a policy of insurance for the benefit of a foreigner, it was held that a foreigner, insuring in England a ship or goods, is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government. In other words, that a foreigner could not recover from a British subject in an English court damages arising out of an act of the plaintiff's own government.

In this case Lord Ellenborough, C. J., in the course of his judgment, referring with approval to *Tonteng v. Hubbard*, 3 B. & P., 291, says: "the court was of opinion that if that had not been the case of a Swede against a British subject the plaintiff would have been entitled to recover, but, as the embargo was produced by the acts of the Swedish government, it was in effect the plaintiff's own act that the vessel was detained."

I cannot see how either of these cases makes for the defen-

dant against the principle that there can be no "act of state" so as to supersede or exclude the operation of the municipal law in the case of subjects of the same state. But for the defendant still another case was cited, which, it was maintained, distinctly (if for the first time) introduced a different rule.

This was the case of *Rustomjee v. The Queen*, which was a proceeding by petition of right in which it was sought to make the crown responsible as an agent or trustee for the suppliant as one of a class in respect of money paid, under a treaty of peace between the Queen of England and the Emperor of China towards the discharge of debts due to British subjects from certain Chinese merchants, and it was held that the act of the crown in rejecting the claim of the plaintiff was not a subject of inquiry in a British court.

Lord Coleridge, in delivering the judgment of the court, said: "The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest acts of the prerogative of the crown. The terms on which peace is made are in the absolute discretion of the sovereign. The Queen might or might not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts. It is a treaty between herself as sovereign and the Emperor of China as sovereign, and though he might complain of the infraction, if infraction there were, of its provisions her subjects cannot. It seems clear to us that in all that relates to the making and performance of a treaty with another sovereign, the crown is not and cannot be an agent for any subject whatever."

In citing this case in support of the defendant's position, his counsel mainly rely upon the passage "as in making the treaty so in performing the treaty, she (the Queen) is beyond the control of municipal law, and her acts are not to be examined in her own courts."

This language has never been quoted by jurists nor cited by judges as possessing the meaning contended for on behalf of the defendant.

The case is one in which the Queen herself was sued, and the ruling upon this point amounts simply to this, that the sovereign

is not liable to be called to account by her subject for the manner of fulfilling the terms of a treaty in a matter which is only capable of being called in question by the other high contracting party.

In the action now under consideration the sovereign is not the defendant, the question is one, not of the mode of fulfilling a treaty, but it relates to that which is in its very nature a temporary expedient during the existence of which the fulfilment of a treaty or treaties is suspended—something done in the meantime for the convenience of the Queen's government—and the cause of complaint is one arising within the jurisdiction of Her Majesty's courts, in which both the parties to the action are her subjects.

I have no doubt that where the terms of a treaty are such that the property of the subject within the territory of his state is affected by them, any contest between subjects of the crown, as to their lawful or unlawful execution, is cognizable by the municipal courts; and that "the meaning of treaties and of all measures for their execution is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts." This is not one of those cases to which the maxim *Inter arma silent leges* applies.

There may be, I admit, a territorial cession of public property in time of peace, although such is not the case here—the territory is British and its internal administration remains untouched; but even in the case of transfer of territory from one state to another, the status of the inhabitants with regard to their real property would, I imagine, remain as before in the absence of stipulations to the contrary.

It is possible to understand the existence of treaties, the provisions of which might in certain events and under certain conditions be actively employed to control or qualify rights of property, but which in other events and under other conditions would leave those rights to their ordinary operation; but this would be a matter of construction, and such treaties would have to be administered as occasion might require according to their legal interpretation and the legal means of enforcing their provisions. No mere subsequent agreement in the nature of a *modus vivendi* in time of peace could, without parliamentary sanction, modify such rights of property as between subject and subject to a greater extent than that for which the antecedent treaty or a prior statute made provision.

In this action of *Baird v. Walker* no such case is presented to us for adjudication. We are not invited at present to decide upon the construction of treaties, or the lawful means for their enforcement; we are only asked by the defendant to say that the alleged authority of the crown contains in itself a sufficient defence to force the plaintiff out of court.

Under the pleadings and all the circumstances, so far as it is open to the court now to notice them, we must hold that the defence is not a sufficient answer to the claim.

It may not be generally known, and I would here note, that this is not the first instance in which a project in the nature of a *modus vivendi* has been proposed with regard to the joint occupation of part of the coast by French and English fishermen. In December, 1763, a project of an agreement was in view, proposed by the French ambassador, for the avoidance of disturbance and dispute between the English and French in carrying on the concurrent fishery. It was referred to the Crown law officers of the day, who were asked whether the Crown could legally enter into it, and would have power to enforce such regulations so far as they related to the subjects of Great Britain; and those eminent authorities answered that the project contained many things contrary to the act of William III., as well in respect of the king's subjects as to the mode of determining controversies arising there, and that the Crown had no power to enter into or enforce such regulations. —*Reeve, p. 120, Chalmer's Colonial Opinions, 545.*

At this point I cannot do better than adopt the following passages from Brown's Constitutional Law: "As for the most petty and inconsiderable trespass committed by his fellow-subject, so for the invasion of property by his sovereign does our law give to a suppliant fully, freely, and efficiently, redress. One exception, and one only, to this rule occurs; and that is, where the sovereign has himself personally done an act which injures or prejudices another, for the King of England can theoretically do no wrong. Our law thus recognizes his supremacy-- it has omitted to frame any mode of redress for that which it deems to be impossible; and yet the law, whilst holding the sovereign personally irresponsible for his acts, will virtually limit this irresponsibility by visiting strictly upon the ministers or agents of the Crown the consequences flowing from obedience to its command. The rule *respondet superior* being here inapplicable, a remedy may be had against the agent, and so the suitor shall not retire from King's Court without having justice done him."

And again, "The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with any show of justice, if its agents were not personally responsible for them. In such cases the government is morally bound to indemnify its agent, and it is hard on such agent where his obligations are not satisfied; but the right to compensation in the party injured is paramount to this consideration, that is to say, special circumstances may render even a public servant personally responsible for acts *bona fide* done by him on behalf of the public, which in contemplation of law injuriously affect another."

In *Feather v. The Queen*, 6 B. & S. 296, Lord Chief Justice Cockburn, in delivering judgment arising upon a petition of right, observed: "Let it not however be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown, but he altogether failed to make good that position. The case of *Buron v. Denman* which he cited in support of it, only shows that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the government of this country, it becomes the act of the state and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants (*Money v. Leach*), and the cases of *Sutton v. Johnstone*, in error, and *Sutherland v. Murray*, there cited, are direct authorities that an action will lie for a tortious act notwithstanding it may have had the sanction of the highest authority in the state. But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the Crown, a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other."

To sum up in short terms, for general information, our conclusions upon the issue before us, the Court holds—

That in an action of this description, to which the parties are British subjects, for a trespass committed within British territory in time of peace, it is no sufficient answer to say, in exclusion of the jurisdiction of the municipal courts, that the trespass was an “act of state” committed under the authority of an agreement or *modus vivendi* with a foreign power.

That in such case, as between the Queen’s subjects, the questions of the validity, intpretation and effect, of all instruments and evidences of title and authority rest in the first place with the courts of competent jurisdiction, within which the cause of action arises.

That therefore the decision upon the present issue, which is confined to these points, is found in favor of the plaintiffs in this action, with leave to the defendant (should it be desired) to amend upon payment of costs.

At the bar we had the voluntary statement of the Attorney General (who appeared with Mr. Kent, Q.C.) on the part of the defendant, to uphold the “legal and constitutional rights of the Crown,” that with regard to those who had suffered loss, there could not be the remotest doubt but that inquiry would be made and that compensation would follow.

It is to be hoped, therefore, that it will be found unnecessary to prolong the litigation in the present case.

Sir J. S. Winter, Q. C., Mr. Greene, Q. C., and Mr. Scott, Q. C., for the plaintiffs.

Mr. Kent, Q. C., and the Attorney General (Sir W. V. White-way, Q. C.), for the defendant.

1891, *March*. CARTER, C. J.; PINSENT, J.

Highway—Negligence—St. John's Municipal Council—Duties of—Bridges—Repair of—Non-repair—Non-feasance—Injury to person—Death resulting from—Liability for—Contributory negligence.

The St. John's Municipal Council, established under 51 Victoria, chapter 5, and having thereunder the control and management of roads, highways, &c., in relation to the making and repairing of the same within the municipal limits, neglected to repair a bridge, the rail of which had broken away, in consequence of which a youth, whilst playing with companions, fell over into the river and sustained injuries which resulted in death. In an action under a local act, which is a transcript of Lord Campbell's act, by the administrator of deceased claiming damages against the municipality for (a) neglect in repairing the bridge, and (b) leaving the same in an unsound and dangerous condition. The judge before whom the case was tried left to the jury the issues, who returned a verdict for the plaintiff. On a motion that verdict be entered for defendants on the ground, (1) contributory negligence; (2) not bound to repair; (3) the bridge outside jurisdiction; (4) no appropriation of funds:

Held—Whoever undertakes the performance of duties by the assumption of office is liable for negligent discharge of same. The accident occurred within the jurisdiction of defendants, and if it had not been clearly established as it was that the deceased met his death by his own negligence, the liability of the defendants would be sustained.

THIS is an action brought under the provisions of the local act 47th Vic., cap. 13, which is a transcript of the English act known as Lord Campbell's, by the plaintiff, the father of his deceased son Frederic A. Carlston, to recover compensation for the injury resulting to him from the death of the said Frederic A. Carlston, which death, as alleged, was caused by the wrongful act, neglect, or default of the defendant, as chairman of the St. John's Municipal Council, by the servants of the said council in not repairing or causing to be repaired, as it was the duty of the council so to do, and leaving in an unsound, unsafe and dangerous condition a certain bridge, situate on the south side of the harbour of St. John's, known as "Dillon's Bridge," whereby the said Frederic A. Carlston fell over the said bridge and received injuries of which he died; claim, \$2,000 damages.

Prior to the passing of the above statute, 1874, and in England 1846, the surviving relatives of a person whose death was caused by the negligent or wrongful act of another, had no remedy against the wrongdoer because *actio personalis moritur*

* This adjudication was prior to that of *Geldert v. Picton Municipality*, 1 R. 447, 63 L. J. P. C. 37.—[EDITOR.]

cum persona, (a personal action dies with the person); and it is important to observe that this right of action is only given where, if the injured person had lived, he would have been entitled to maintain an action and recover damages in respect of the wrongful act, neglect or default of the person who would have been liable if death had not ensued. In estimating the damages the jury must compensate for pecuniary loss alone; they cannot consider the grief of those who have lost a dear relative; *Blake v. Midland R'y Co.*, 18th; Q. B. 93.

This case was tried in the last fall term before Mr. Justice Pinsent; counsel for the defendant body moved for a nonsuit on various grounds; but the judge at that stage, under the peculiar circumstances connected with the case, properly left the issues to the jury, who returned a verdict in favor of the plaintiff for \$500.

Mr. Emerson, Q. C., moved that judgment be entered for the defendants on the following grounds:—

(1.) That the deceased Frederic A. Carlston contributed, by his negligence, to the accident which resulted in his death.

(2.) That it was not the duty of the defendants to maintain or keep in repair the bridge described in the plaintiff's statement of claim.

(3.) That the said bridge and the road leading thereto and therefrom was without the city limits, and beyond the jurisdiction of the defendants.

(4.) That no funds were appropriated by the government for the purpose of maintaining or repairing the said bridge or said road.

The arguments of counsel on both sides were heard in the last March sittings.

Having had the opportunity of perusing the notes taken at the trial by my brother judge, the following is, I believe, a substantially correct summary:

"Dillon's bridge is built over a ravine, and is part of the highway on the south side, some distance to the eastward of Syme's bridge; its southern edge is close to the side of the hill, and at the northern edge is a depth of about fourteen to sixteen feet, where the deceased fell; he had just before been, with three other young men, to the westward of the bridge; two of them had preceded him there, talking together by the western part of the rail on the northern side; the deceased followed with a companion, walked up between the two and behind one of them on his right side, who had his back to the rail, put his hand on the right shoulder of the other, shortly after he fell over, dragging the other with him."

There is some discrepancy in the statements, as one of the two first on the bridge says it was on the south side deceased passed. One of the plaintiff's witnesses, who was with the deceased, says the bridge was in a dangerous state for ordinary foot passengers, any person might have slipped over; he also says a person using ordinary care would not go over,—this is corroborated by another of the plaintiff's witnesses,—the railing was off on the northern side, between the two eastern posts, which were not connected; the posts were sound; they were not sky-larking. A witness residing on the south side says he was five minutes on the bridge on the day of the accident; saw nothing wrong with it; there might be a portion of the rail gone on the southern side without his noticing it; no apparent danger to foot passengers. The road inspector of south side says he saw the bridge in good condition a few days before the accident; the rail had not then gone; never heard it was defective, if he had, would have repaired it; in 1888 he repaired it to last six or eight years; by order of the council he repaired it after the accident. Another witness living on the south side says he reported to the inspector early last spring (1890) the rail was off the bridge, and it wanted repairs; they were not done then; rail had been cut away; bridge had been repaired in 1890, not 1888,—the two last witnesses contradict each other, both as regards notice of defect and time of repairs. Another inspector says three years ago—so far corroborating the first inspector examined—was engaged in having the bridge and railing thoroughly repaired; it ought to have lasted four or five years; saw it ten days before the accident; should have noticed and reported if half a rail off. The chairman of the Municipal Council says that body received no money from government this year (1890) for the south side; an amount was put in estimate; repairs were made in expectation of the receipt of moneys; in case of danger inspector authorized to repair; no report from him on the subject. A witness, who resides beside the bridge, states he saw nothing wrong with it when passing daily; saw the four on Sunday, 4th May; the deceased and the one who fell with him put their hands on each other's shoulders trying to wrestle back and forth; deceased was on the outside; shook each other by the shoulders, and the next thing he saw was both going over the bridge; went to their assistance, and deceased said when placed on the bank, "That's what I got, Mr. Power, for sky-larking on Sunday"; told this to his father and others; couldn't tell if a piece

of the rail gone, in the morning it might be there and in the evening it might be gone and you would not notice it; bridge repaired 1888. The wife of the last witness was standing by her husband when the accident happened; she did not see it, but followed her husband when he went to assist, and she confirms him as to what the deceased said at the time. He had medical attendance and died about twelve hours after the accident; he appears to have been about seventeen years of age, sober and well-conducted; was an apprentice with his father in the house-painting business.

The Municipal Council was organized under the Act 51 Vic., cap. 5, which after prescribing by the 13th section (Q Y.) 12th section as declared by the 31st section, the limits or boundaries, not including the South-side, within which the council "shall have, possess, exercise, perform and discharge all the functions, powers, rights, obligations and duties which under any act or law in force before the passing of this act, have been vested in or exercised, performed or discharged by (1) the Board of Works, in and upon and in relation to the making, constructing, maintaining, repairing, or improving of roads, streets, lanes, highways, firebreaks, or thoroughfores," &c., &c.

And after several other provisions more especially applicable to matters within the town or city limits, the 55th section enacts that the council shall have the management and control of the local affairs of the South-side of St. John's, extending as far west as Syme's bridge, inclusive, and shall have, exercise and perform the like powers, authorities and duties in relation thereto as are hereinbefore provided in relation to the town of St. John's within the town or city limits, except as in the 56th section, by which the council shall not be required to furnish a supply of water, nor to provide sewerage for the South-side, nor shall the owners or occupiers of property situate there be liable to rates or assessments under this act, except for the purpose of widening or improving the roads or streets under the authority of the acts for the re-building of the town of St. John's, for which purpose the council shall have power to tax and impose rates and assessments, subject to confirmation by the legislature; the 57th section provides, "The council shall expend upon the making and repairing of roads, streets and bridges on the South-side, such amount as shall be annually appropriated out of the legislative vote for the district of St. John's West for the South-side, and also the amount annually granted for a main line of road on the South-side."

The rates and assessments which the council is authorized to impose have reference to the town only in respect of the general water company, sewerage, and fire brigade; and the only funds for repairing roads, streets and bridges on the South-side are those to be appropriated by the legislature, as provided for by the above section.

Every case must depend upon its own circumstances, and the first thing to enquire into is, what is the authority of the council with respect to roads, streets, &c. And it is defined to be that which the Board of Works had exercised theretofore, so far as this action is concerned, viz, the superintendence and management of all public roads, streets and bridges, made or to be made within the colony, not to affect the authority conferred on outport commissioners; and so far as the defendant council has control, confined to the town limits and the South-side. Almost in identical words was the statutable authority conferred on the municipality of the borough of Bathurst, New South Wales, *Ats. McPherson, 4 App. cases, 256*, "That the council shall within the boundaries of the municipality have the care, construction and management of public roads"; there the council had constructed a barrel drain into which ran an open drain, the brick-works of which having broken away and not having been repaired, a hole was caused, into which the plaintiff's horse fell, carrying the plaintiff with him, crushing the plaintiff's leg against one side of the hole, and causing a compound fracture of the leg. The majority of the Colonial Court held the council liable, as a duty was cast upon it to keep the roads, within the boundaries of the municipality, in such a condition of repair as to prevent danger to the lives and limbs of passers-by. The Privy Council on appeal upheld the decision of the majority of the judges in the New South Wales court, *and that in respect of the action there was no principle upon which a distinction could be supported between nonfeasance and misfeasance*; there was authority to raise a comparatively small sum by rates, but inadequate for keeping in repair the large extent over which the council had the management and control; yet, their lordships of the Privy Council being of opinion there was a duty cast which had been accepted, although not expressly imposed by the statute, and apparently irrespective of the state of the funds at the command of the council, held that body liable to the plaintiff. The chief justice in the New South Wales court, who differed from the other judges, considered that such bodies as the defendants there would be finan-

cially ruined by such actions if decided against them; while Mr. Justice Haggrave significantly observed "that the corporation, as the only body authorized to meddle with the roads, was bound by the act to repair them so long as they remained by their authority open to the public." In some cases of negligence there is a material distinction between nonfeasance and misfeasance, respecting which a late decision will be found in the judgment of the Privy Council (*Gibraltar Sanitary Commissioners v. Orfila*, 15 app. cas. 400). *Hartnell v. Ryde Commissioners*, 4 B. & S 361, cited by Mr. Kent, was referred to approvingly by their lordships, and it was in remarking on that case they said, there was no substantial difference in which the duty existed under the New South Wales statute and one expressly imposed by the statute.

I cannot perceive from the authorities that the liability of a public body for personal injury occasioned by neglect of duty is dependent upon the statute creating them expressly rendering them amenable to an indictment for misdemeanor, as was suggested in the argument; the case of *Gilbert vs. The Corporation of Trinity House*, L. R., 17 Q. B., 179, was cited in our judgments in *Parsons vs. The Board of Works*, in which *Day, J.*, said "The law is plain that whoever undertakes the performance of, or is bound to perform, duties imposed by reason of the possession of property, or by the assumption of office, or however they may arise, is liable for injuries occasioned by the negligent discharge of those duties. It matters not whether he makes money or profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them, he is responsible for the acts of his servants if he is obliged to perform the duties by employing them in the same way as his own." It is almost useless to refer to other decisions on these points, but I may extract the following from *Addison*, 6th ed., 726:—Whenever an act of parliament imposes upon commissioners or any public body the duty of maintaining or repairing any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is sustainable against such commissioners or public body unless there are provisions in the statute creating them for limiting their liability, or the duty of repairing is not absolute, the rule being, that in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject

to the same liabilities as the general law would impose on a private person doing the same things, and this whether they have or have not funds at their disposal for effecting the repairs; though, if there are no funds there may be a difficulty in the way of the plaintiff getting his damages. The cases supporting these positions will be found in the notes. The defendants are an elected and independent body having the appointment of, and control over, its employees, and altogether different from the board of works, which was an emanation of the government having the appointment of all officials and servants. The answer to an action such as this against the board of works was *respondeat Superior*, and yet a petition of right would not lie, and there was and is no statutable provision as in other colonies by which the government could or can be sued for a tort of its officials or servants; the consequence was an injured person was practically without remedy.

The bridge in question is within the jurisdiction of the defendants on the south side, and is as much part of the highway as the solid ground; passers by, whether in vehicles or on foot, are in my opinion entitled to be protected in life and limb from danger by a sufficient railing where dangerous, if otherwise, and injury to a person were proximately occasioned therefrom, the defendants, if aware of the insufficiency or defective condition, or, but from the culpable negligence of their servants, ought to have known it, then I should think that the principles above mentioned deduced from numerous decisions of the courts, would be applicable in determining the liability of the defendants; for instance, if a person passing by in a dark night or in a blinding snow-storm, were to fall over where the deceased fell, and thereby became injured, and which would not have happened had there been a sufficiently substantial rail; as in the broad daylight, I can scarcely imagine it possible for a foot passenger, or a horse and vehicle driven with ordinary care, whatever the condition of the rail may have been, to fall over the side of such a bridge. And this I consider, as regards the plaintiff, has been fully borne out by the testimony of the witnesses. Besides the reasoning which bears directly on the question of any culpable neglect or default by the defendants, which in this case could have been the proximate cause of the sad event, the defendants directly set up in defence the contributory negligence of the deceased, the doctrine of which is founded on the maxim, "*In jure non remota causa sed proxima spectatur*," (that is, in law the immediate not the remote cause

of any event is regarded), and contributory negligence in law is that sort of negligence on the part of a plaintiff which is the proximate and not the remote cause of the injury, of course, in one sense every negligence which contributes at any time or in any degree is contributory negligence, but the phrase has acquired a technical or legal meaning, and in the legal sense is defined as above stated,—*Smith, &c, on negligence*, 226, thus in *Davies vs. Mann*, 10 M. & W., 546; *Rudley vs. N. W. Ry. Co.*, L. R. 1, app. cas., 754; *Tuff vs. Warmon*, 5 C. B. N. S., 573. The rule of the Roman law on this kind of negligence is short and explicit, ‘the harm I bring on myself I must bear myself,’ *Bevan on negligence*, 128. The case which first formulated this rule of law is *Butterfield v. Forrester*, 11 East 60, and is usually referred to. It was an action for obstructing a highway whereby the plaintiff, who was riding, violently rode against the obstruction and was injured. Lord Ellenborough laid down the rule, “one person being in fault will not dispense with another using ordinary care for himself, two things must concur to support this action, an obstruction on the road by the fault of the defendant, and the want of ordinary care to avoid it on the part of the plaintiff.” This was approved and adopted by the Court of Exchequer in *Bridge v. Grand Junction Ry. Co.*, 2 M. & W. 244; *Parke B.*

Saying, the rule of law is laid down with perfect correctness in *Butterfield vs. Forrester*, and that rule is, there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care, have avoided the consequences of defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided, then he is the author of his own wrong; and to the same effect in *Marriott vs. Stanley*, 1 M. & G. 568, and later in giving judgment in the Exchequer Chamber Wrightman, J., said the proper question for the jury in this case, and indeed in all cases of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care on his part, the misfortune would not have happened. In the first place the plaintiff would have been entitled to recover, in the latter not, as but for his own fault the misfortune would not have happened.

It is essential to bear in mind in cases like this, what is negligence in law; it is defined to be a breach of duty, unintentional and proximately producing injury to another having

equal rights, of which the law takes cognizance; and a breach of duty is a culpable act, contrary to the duty and proximately producing injury.—*Smith*, p. 6, 2nd ed.

We have seen by the act under which this action is brought, that it is to be regarded in the same manner as if the deceased had lived and been the plaintiff. I may here refer to *Bevan*, Ps. 1042-3, which I shall read so as not to unnecessarily lengthen my judgment, where cases in the American and English courts are mentioned respecting travellers not using the highways for the purpose intended. Referring to the judgment of Bigelow, C. J., in *Stickney v. City of Salem*, 85 Mass. 374; *Gwinnell v. Eamer*, L.R. 10 C.P. 658; *Jewson v. Gatti*, 1st Times, L.R. 635, 2nd Ib. 481, 441, and in connection would refer to *White v. Hindley Board of Health*, L.R. 10 Q.B. 219.

As to the onus of proof in cases like this, Brett, M.R., in the Court of Appeal in *Wakelin v. London and S. W. Ry. Co.*, expressed his opinion that the plaintiff was not only bound to give evidence of negligence on the part of the defendant, which was a cause of death of the deceased, but he was bound to give *prima facie* evidence that the deceased was not guilty of negligence contributing to the accident; but the House of Lords corrected that view in determining that the plaintiff was required to give evidence only on the first head, that the accident was through the negligent act of the defendant; and in *Bevan*, p. 187, "Where the plaintiff gives evidence of a state of things equally consistent with the wrong being caused by his own negligence, or by the negligence of the defendants, he has not proved his case."

I can fully appreciate the observation of Mr. Justice Denman in *Finnigan v. London and S. W. Ry. Co.* 1889, "that there are no questions which had so perplexed and divided judges as those questions of negligence."

While we must all sympathize with the bereaved family of so well conducted a youth, as the deceased is represented to have been, we must not allow sentiment to prevail over our sense of justice in the discharge of a public duty, and not permit what may appear to be a hard case to make bad law; and in applying the principles of law above set forth to the facts in this case, it appears to me to have been clearly shewn that the fatal accident which unfortunately resulted in his death, was proximately occasioned by himself, and as the judge at the trial would have been justified in directing the jury to find for the defendants, I am of opinion they are entitled to have the judgment of the court entered up for them.

As the St. John's Municipal Council is a recently organized body, I consider it expedient to explain under the authorities what in my opinion are its statutable duties and obligations in an action of this character.

Having regard to the circumstances, I feel assured it is only necessary to intimate that each party should bear his and their own costs.

HON. MR. JUSTICE PINSENT:

The plaintiff in this action sued the defendant council for damages sustained by him by reason of the death of his son, an exemplary youth and valuable assistant to his father in his business of a painter.

The cause of the death of the deceased was alleged to be the negligence of the council in not repairing and replacing the rail on one side of a bridge on the South-side of Saint John's, called "Dillon's bridge," which the deceased fell over, and hence received mortal injuries.

The trial was had before me with a special jury, and if the action is sustainable, the amount of the verdict (\$500) was reasonable; indeed it is not impeached.

It is contended on behalf of the council that the plaintiff's case, which was based upon a charge of non-feasance, failed from absence of proof of neglect of duty by that body, and by reason of proof that the fatal accident arose from the carelessness of the deceased himself; but moreover, that under its constitution the council as such is not responsible in damages for accidents occurring within the limits of its management, and particularly, that it is not responsible with regard to the South-side of St. John's.

The position taken for the defendant is this, that the Municipal Council has, in relation to the control and management of certain civic affairs pertaining to St. John's, simply succeeded the Government and the Board of Works, and that therefore the case of *Parsons vs. The Board of Works*, decided by this court in the year 1888, and the authorities there cited, govern this case.

That, no doubt, was a carefully considered judgment, and as it reviews all the leading authorities, it is unnecessary to do more than refer to it and with approval at this time.

There the board of works was held to be the mere delegate of the government, expending only the funds supplied to it for

approved and directed purposes, being indeed simply the machinery for the performance of certain work which the government ordered or allowed and paid for.

Is that the case with the recently constituted Saint John's Municipal Council, either in whole or in part?

To turn for the present to the facts of the case, they are shortly these: that on a Sunday afternoon in May last, the deceased Frederick Carlston and three companions were taking a walk. Two of these companions were ahead of the deceased and another, and the first two stopped at Dillion's bridge for the latter to come up, which they did in a few minutes. The deceased came along and passing behind one of those already on the bridge (named Ridout), and who was standing near the edge on its north side, put his hand on Ridout's shoulder, and "slewing round fell over the side of the bridge, taking Ridout with him." The fall was one of about sixteen feet, upon jagged rocks. Ridout was not seriously injured, but the plaintiff's son received injuries from which he died before next morning.

The plaintiff's case is that the cause of this was the absence of a rail on the bridge; that there had been a rail there which should have been replaced.

For the defendant it is said that there was no necessity for a rail there for passers-by observing ordinary care and prudence; that the bridge had been thoroughly repaired about two years ago by the board of works; that the council could not be accountable for the disappearance of a rail from a bridge which was used constantly as a gathering-place, and even for amusements, such as dancing and general sky-larking. That the conduct of the deceased youth in going upon the bridge in the way he did, even as described by the plaintiff's witnesses, was not that of a person using ordinary care. Moreover, the defendant adduces evidence that the deceased was seen playing or wrestling with one of his companions on the bridge—the one who fell over with him; and one witness (a woman) swears that as the deceased was after the accident being lifted on to the bank he said, "There's what I got by sky-larking Sunday."

There is evidence that it had been reported some time before to the inspector for the council by a person wanting employment, that the rail was off the bridge, but this is positively denied by the inspector.

It must be borne in mind that bridges and such public structures are not places intended for congregating and loitering upon, nor should they be devoted to purposes of sport or athletics.

These are not their proper uses; and persons thus using them must take the consequences of their acts. To establish a contrary principle would lay open the Municipal Council, as the representative of the town, to all kinds of absurd claims, such as no public body should be subject to.

We think upon these grounds alone the verdict should be set aside, and judgment be entered for the defendant.

But there remain the other questions, now raised for the first time, as to the liability in any case of the council to actions of tort.

In my judgment, the position of that body now is to be distinguished from that of the Board of Works in Parson's case.

In a recent case before this court (*Stabb, Admr v The Council*), the general objects and purposes, functions and obligations, of the body have been referred to. The Municipal Council is not in my judgment, within at least "town or city limits," to be regarded as "an official delegate of the government, through which machinery is provided for the execution of public works of an uncertain character"—*Paisant, J., in Parsons v B. Works*. It is an independent body or corporation, with very extensive although qualified powers.

Truly, it receives part of its funds from the public treasury, but it exercises absolute control over the application of that money, and it possesses several other sources of income, and moreover, may raise the amount of existing rates and assessments to meet necessarily increased expenditure; and by section 53 of the said act, its liability in actions of tort as well as contract is expressly contemplated.

With regard to the South-side of St. John's, there is a very marked difference in the functions and powers of the council, as compared with its position within the town.

There, while with regard to the local affairs of "the south-side of St. John's," the council is declared by the first part of section 52, to possess similar authority to that exercised within the city limits, the section concludes, "except as hereinafter provided." The exceptions (sec. 56) are that the council shall not be required to provide a supply of water, or provide sewerage for the south-side; and that the owners and occupiers of property there shall not be liable to rates or assessments beyond those involved in the creation of new roads or streets, under the Re-building Acts. With regard to repairs, the council is empowered under section 57 to expend such amounts in the making and repairing of roads, streets, and bridges, as shall be annually appropriated by the legislature.

The council had at and prior to the time of the accident to Carlston no funds of this last kind, or any other kind to expend upon the repair of Dillon's bridge.

Any sum which may at any time be appropriated by the legislature in that way, being of a limited amount, must necessarily be subject to be expended according to the exigencies of the public service and safety, in the discretion of the government or of the council. In this case there may have been and probably were, (for the bridge is said to have been in very good general order), places more urgently calling for expenditure if the council was in funds to effect them.

In my opinion, the sections relating to the south-side of St. John's are of an exceptional character, as indeed they are separate and distinct in their position in the act.

I think that in the case of the south-side the council is simply a convenient medium of expenditure for the government, and that, at least in cases of non-feasance where there is no special allocation of money for a specific work, it is not as a body liable in an action for non-repair. To hold otherwise would have the effect of making the rate-payers of the city responsible in damages for accidents outside its limits.

At common law no action can be maintained by any one of the public in respect of an injury sustained by a highway being out of repair.

The conclusion at which I arrive then is, that the St. John's Municipal Council is liable as in the case of an ordinary individual, for acts of commission or omission in the performance of its duties and the exercise of its powers within the "town or city limits," but that it is not responsible at least in cases of non-feasance with regard to the south-side. There is a case very much in point decided last year, viz, *the Sanitary Commissioners of Gibraltar ats. Orfila and others*, 15 App. Cases, 400.

The judgment in the present case must be entered for the defendant.

Mr. Kent, Q. C., for plaintiff.

Sir J. S. Winter, Q. C., and *Mr. G. H. Emerson, Q. C.*, for defendants.

1891, *April*. PINSENT, J.; LITTLE, J.

*Landlord and tenant—Lease—Agreement for extension—Ejectment—
Specific performance—Injunction.*

Where a lease was about to expire the tenant communicated with the landlord for an extension. The landlord through his agent offered an extension on certain terms. The plaintiff contended that he accepted in writing by a note to the agent the proposed terms. The proof of delivery of acceptance to agent was unsatisfactory. Previous to the expiry of the term, and on the assumption that his lease was renewed, the tenant sub-let portion of the premises for a term, and the agent of the landlord though not admitting the extension drew up the lease between the tenant and sub-tenant. Term having expired, the landlord sought to eject the tenant. The tenant set up extension of lease and claimed specific performance.

Held—That proof of delivery to agent of tenant's acceptance of renewal terms was unsatisfactory, but in view of the privity of agent to the sub-letting by tenant there was evidence sufficient to establish that the extension had been concluded between the parties, and to entitle the tenant to specific performance.

THE plaintiff had been a tenant of the estate now represented by the defendant of certain premises on the south side of water street, which, being in a bad state of repair, he had taken for a term of twenty years, upon a repairing and improving lease, at an annual rent of \$240.

That lease expired in October, 1889. Some years prior to its expiry the plaintiff wrote to his then landlord (J. W. Des Barres), since deceased, representing the outlay he had been obliged to make on the premises, and applying for a renewal or extended term.

Des Barres replied in very considerate terms; referred the plaintiff for information to Mr. LeMessurier his agent; stated that he was well aware of the outlay that had been incurred, and that it was his wish to give every consideration to the circumstances, and inquired what terms the plaintiff expected.

The plaintiff in reply suggested an extension of twenty years from expiry of the then lease, in consideration of which he would carry out certain named improvements and pay £80 per annum rent.

On the 19th April, 1886, LeMessurier, writing to plaintiff, and signing as "agent for Des Barres," states "Mr. Des Barres desires me to inform you that he will grant to you an extension of your present lease for fifteen years and ninety pounds per annum, on the terms mentioned in your letter of the 21st July last."

The plaintiff states that almost immediately on the receipt of this letter, on the 22nd April, he wrote to LeMessurier expressing his regret that his own proposal had not been accepted, but stating "However, in the meantime, I must accept the terms of yours of above date, hoping to receive such further consideration as you may see fit to grant."

Now comes a difficulty, the defendant's agent swears he never received that note. The plaintiff's proof of its delivery by a person in his employment, is not satisfactory. The suggestion is, that as the memory of this messenger only serves him as to the delivery of one note only at LeMessurier's premises; and as it seems he did deliver one at another time, and at another place, concerning another matter, the evidence of acceptance of the offer of deceased Des Barres fails.

Then arise other circumstances which, (if proof of the specific acceptance by the letter from Duchemin, of Des Barres' offer was necessary), may be either taken as preponderating evidence in favor of the fact of the plaintiff's final letter having been received; or as of themselves conclusively shewing that the terms proposed by the deceased Des Barres had been accepted by Duchemin, and that an arrangement had been concluded between them for an extension of fifteen years and £90 per annum.

The principal facts are these:—In June, 1888, Duchemin, having effected an arrangement with Messrs. Davidson and Fletcher for a lease from him of part of the premises, seems to have consulted LeMessurier upon the subject, particularly with reference to the length of lease he might give them, in view of Des Barres being induced to do more than had been agreed upon as to the period of extension. The plaintiff, after so consulting LeMessurier, decided to give Davidson and Fletcher a twelve years' lease at \$520 rent, being a period less than three years of his own promised term. This lease was drawn up by LeMessurier for the plaintiff and his lessees, and the execution of it by the parties was attested by him, in which he was acting quite properly, and consistently alike with his principal's letter and Duchemin's desire.

It then appears that Duchemin fell into some arrears for rent, and on the 1st May, 1889, LeMessurier wrote to plaintiff stating that, owing to his failure to pay the rent to date, the lease would not be renewed at the end of the term; a threat which, while it might have been effective if the rent had remained unpaid, and proper proceedings had been taken to

dislodge the plaintiff, distinctly and in terms recognizes a renewal.

Early in October the plaintiff paid and defendant by his agent accepted from plaintiff, who was just about leaving the country for some weeks, the full rent due to the Des Barres estate up to the end of October.

The agent had in September notified the plaintiff that the premises had been let by him to the same persons to whom they had been already leased by Duchemin, with LeMessurier's privity as above stated. Of this intimation the plaintiff took no notice. It appears that the lease from defendant DesBarres to Davidson & Fletcher would produce to the defendant about \$120 per annum more than the rent the plaintiff was to have paid under the renewal.

Proceedings in ejectment having been taken against the plaintiff by the present defendant, who now represents the estate, the plaintiff in this suit obtained an injunction to restrain the proceedings in ejectment, and to obtain specific performance of the offer and agreement of the deceased DesBarres to extend his term or renew his lease.

In my judgment there cannot be a doubt, either in law or fact, of the plaintiff Duchemin's right to a decree for judgment and for specific performance of a lease for fifteen years, and at an annual rental of £90 (\$360), and that the plaintiff should have his costs and expenses of suit.

HON. MR. JUSTICE LITTLE:

The proceedings in this cause were commenced by petition for the specific performance of an agreement, alleged to have been concluded between the parties for the extension of a term of years, then held under lease by the plaintiff in certain premises on the south side of Water street, and for an injunction to restrain the defendant from proceedings taken to eject the plaintiff from said premises.

The matter had been originally argued before his lordship Mr. Justice Pinsent, whose judgment went in favor of the plaintiff. But as the defendant was desirous of obtaining the judgment of the court a rehearing was granted, when counsel for the parties were reheard in argument before the full court. It may be observed that no question of law is raised or in dispute; the decision to be arrived at depends therefore solely on the sufficiency of the evidence to establish the alleged agreement. This

evidence, accompanying the record, showed that plaintiff occupied the premises in question for about twenty years as tenant; his last term of fifteen years expired in 1889. That in anticipation of that expiry, he communicated in writing on the 14th April, 1884, with the late J. W. DesBarres (the then representative of the estate), requesting that a further extension be made to him, referring at the time to the large amount said to have been expended in repairs and improvements on the premises, and to his intention of still further improving them. To this application he received a favorable reply by letter of the 14th July, 1884, acknowledging the fact of beneficial improvements having been made, and desiring plaintiff to particularize the terms of his required extension. The plaintiff in answer thereto, by letter of the 15th July following, proposed that his tenancy might be continued for a period of twenty years from 1889, at an annual rental of £80 currency. This offer was met by one from defendant, communicated to plaintiff by Mr. LeMessurier in the following note, dated 19th April, 1886:—"Mr. DesBarres desires me to inform you that he will grant to you an extension of your present lease for fifteen years at ninety pounds per annum, on the terms mentioned in yours of the 21st July last." This offer was accepted by plaintiff (as he deposes) in a letter, bearing date the 22nd April, 1886, addressed to Mr. LeMessurier and concluding as follows: "I must accept the terms of your note, hoping to receive such further considerations as you may see fit to grant," &c., &c.

The proof of the service of a copy of this letter on the agent, or its delivery to him, was unsatisfactory, and in the absence of evidence otherwise supplied might have operated to the exclusion of its contents from any consideration or to the inference that no acceptance of defendant's offer occurred, and consequently that no concluded arrangement had taken place. The evidence of the plaintiff was clear and positive as to the letter having been written at that date, enclosed, addressed to Mr. LeMessurier, and sent by a reliable messenger for service or delivery. The messenger also as positively deposed, that about the time stated, he received a letter from plaintiff with such directions, and that he left it with a boy in Mr. LeMessurier's office, then on the south side of water street. Whereas LeMessurier as positively denies the receipt of the letter, and that at the time stated he had no office on the south side of water street.

However, the facts and circumstances subsequently arising, the outcome of these negotiations, and the clear inferences drawn

from the acts and conduct of the parties, are sufficient to relieve this important point in the case from any further serious doubt.

It might also be observed that after such a favorable interchange of letters and evident anxiety on the part of the plaintiff to secure an extension, it is incredible that he should (as contended for by defendant) have taken no notice of the last written offer of defendant. The plaintiff deposes he felt satisfied in having closed with this proposal, and relied on its being fulfilled. Subsequently from time to time he inquired of the agent about the lease, and when he would receive it, and that this status of the parties continued until May, 1888. At this time certain negotiations which had been going on between the plaintiff and Messrs. Davidson and Fletcher, for the letting of part of these premises, and of which LeMessurier was fully cognizant, now ripened into an agreement for a lease. The term to be given by the plaintiff to these parties was for twelve years from that time. Both plaintiff and Fletcher depose that no objection at all was raised by Mr. LeMessurier as to the right of the plaintiff to enter into such a lease or plaintiff's power to grant any such term. On the other hand, in explanation of the extraordinary conduct observed by him for preparing such a lease, Mr. LeMessurier states "he inserted the twelve years in this lease because Duchemin asked me to do it. I believing at the time he hadn't the power to give twelve years, but not knowing but he might get it," he believed Davidson and Fletcher understood plaintiff's position, and he did not draw the lease in his capacity as agent, but was engaged by the parties themselves and paid by them. The position of the agent under such circumstances was most equivocal, and the inference to be drawn having in view the evidence of Fletcher on the matter certainly strengthens the credibility of plaintiff's testimony. The next piece of documentary evidence calling for reference is the note from LeMessurier to plaintiff, dated the first day of May, 1889, and is as follows:—"I am instructed to advise you that your lease from DesBarres estate for house No. 367 water street, which terminates on the 30th October next, will not be renewed owing to your failure to pay your rent to date." A few months after, the premises appear to have been leased by DesBarres to Davidson & Fletcher, at an advance of \$120 on the rental proposed in the letting to Duchemin.

The language of this note of May, brief as it is, when applied to the evidence in relation to the delivery or non-delivery of the letter of acceptance, coupled with the privity of the agent

to this sub-letting to Davidson and Fletcher, will be found to supply all that might be required to establish the fact that the terms of the proposed agreement were mutually acceptable, and were arranged and concluded between the parties. The words clearly point to, and express in effect an intended rescinding of the arrangement to renew or extend the current term because of the arrears of rent due the estate. It supplies evidence in itself of the fact of a pre-existing agreement to renew. The rent referred to is admitted to have been subsequently paid off. After a careful perusal of the evidence I must conclude that its weight and relative value entirely support the case set up by the plaintiff. It establishes in definite terms the written agreement called for; that its terms were mutually arranged and fully concluded by the parties.

I therefore, concur in the conclusion arrived in the judgment delivered on the first hearing of the cause.

R. J. Kent, Q. C., for plaintiff.

Sir J. S. Winter, Q. C., for defendant.

LEAHY v. O'KEEFE, ADMINISTRATOR OF LEAHY.

1891, May. HON. SIR F. B. T. CARTER, C. J.

Donatio mortis causa—Deposit receipt.

The deceased requested his sister, with whom he lived, to take from his trunk a bank deposit receipt for a large sum of money, and then, in the presence of his sister and her husband, said, "What money was in that note was his sister's and her husband's"; deceased then handed his sister the note, which she placed in her own trunk and retained possession of till deceased's death. In an action by the next of kin for a distribution of the estate of intestate:

Held—That the facts as deposed to did not constitute a *donatio mortis causa*, and that the estate, including his deposit receipt should be distributed amongst the next of kin.

THE bill in this case, which was filed on the 13th June, 1890, is for an account of the estate and distribution among the next of kin of the late Michael Leahy, who died in St. John's in September, 1888, and who had never been married. The defendant is the sister of the intestate and administratrix of his estate, and the plaintiff is the widow of the late Martin Leahy, a deceased brother, who left six children surviving him, still

living, and who claim to be entitled to their shares as of next of kin. The defendant says in answer that at the death of intestate he had deposited in his name, in the Union Bank of Newfoundland, the sum of \$1,457, including interest, of which there was the usual deposit receipt, and which amount was received by her after the grant of administration, out of which she paid the funeral expenses and debts of the intestate, and, as will appear by the accounts filed by her in this court, there is a balance in her hands of \$796.57, and she claims for herself and husband, Robt. O'Keefe, in their own right, the full amount of the deposit receipt, and thus the whole estate, by way of a *donatio mortis causa*. On a reference to the master to take and return the evidence in support of this claim, the defendant, on her examination on oath, declared "that the intestate had lived with her and husband about four years to the time of his death; he was about seventy years of age, had been ailing twelve months, and kept his bed at times the last fortnight of his life"; and further declared "I had a conversation with him about a bank book, it was a deposit receipt of the Union Bank; it was four or five days before his death; he first spoke and told me what money he had in the Union Bank was for me and my husband; I made the remark, in reply, that Martin's wife (the plaintiff) may be looking for some of the money; he said Martin's wife had no call to the money; he then told me not to attempt to give her a penny of the money, nor one belonging to her, and said she had no call to it; I said, you may depend upon my word, I won't give her a penny of the money if I can help; there was nobody in his bed-room but myself and Michael at this time; I said if you die I will bury you decent; he told me to go to his trunk and hand the deposit note belonging to the bank to him; I took the note from the trunk and handed it to him; he then told me to call in Robert, my husband; I called him up, and he came into the room; Michael said what money was in that note was mine and Robert's; Michael then had the note in his hand and handed it to me; I kept it in my possession all along between that time and his death; he never asked me to return it to him, and never spoke to me about it; I laid it in another trunk of my own, which was on the top of his trunk."

There was no cross-examination of this witness which is represented to have arisen from sickness in her household.

Robert O'Keefe testified, "I remember being called up into Michael's room by my wife three or four days before he died;

went up into his room; no one else but he, my wife, Anne, and myself, were present; he was sitting on the bed-side when I went in; he had a paper in his hand, which he handed to her: he said there was some money in the bank belonging to that paper; he said, it was for Anne and you while you live; he told Anne and me not to give a penny to Mary Leahy or one of the family; he said nothing else; said he didn't think he would recover; I don't think he lived two days after." In cross-examination, said "It was between six and seven o'clock in the evening I was called up to Michael's room: I do not know where he got the paper he gave my wife; I did not know what was in it, or what paper it was; the exact words he said were: 'There is enough in that for her and me'; I don't know what he meant; the man might have different meanings; he didn't tell me what the paper was; I didn't look at it; I didn't know what was in it; I didn't know it was a deposit receipt; my wife or Michael did not tell me; he said there was enough in that for her and me; that's all I know about it. I then went down stairs again and left them there, I did not see her put the paper in the trunk, she held the paper in her hand." This is the material evidence respecting the alleged gift. I have given it in the first person, as taken by the examiner.

There is additional evidence which has a more especial bearing upon the large charges in the account rendered by the defendant, and which was the chief subject of the first-named reference to the master to report upon to be hereafter disposed of, as at present our attention is confined to the question of the validity of the gift *donatio mortis causa*. Upon this we have heard the arguments of Mr. F. Morris for the plaintiff, who referred to the judgment in the estate of Murphy in this court, 1888, and Mr. Kent, Q. C., for the defendant, who cited, in sustainment of the gift, *Amiss vs. Witt*, 33, Beav. 619; *Moore vs. Moore*, 13 Eq.; *In re Farman vs. Smith*, 58 L. J., 1888; *re Dillon Duffin vs. Duffin*, L. R. 44, C. D. 76.

From the statements of counsel and papers on file it appeared the accounts of the estate were rendered by the defendant on the 12th April, 1889, on the application of the plaintiff's solicitor, made to Mr. G. Emerson, the solicitor for the defendant; that by judge's order of the 23rd of the same month, the accounts were referred to the master to inquire into and report upon, which he did on the 20th September following; that Mr. Emerson did not during the reference attend to represent the defendant, and, after several adjournments, Mr. Kent, Q. C.,

first appeared for her on the 13th May, and on 16th May gave the first intimation of the *donatio mortis causa* claim.

After counsel had moved for the confirmation of the master's report in October, a formal petition of said Anne O'Keefe, under the Trustees' Act, was filed, setting up the alleged gift. It was agreed upon between the parties that the evidence taken by the master on that petition should be received in evidence in this case.

There can be no doubt that a valid *donatio mortis causa*, that is, a gift in contemplation of death, may be conferred of a bank deposit receipt though no absolute property passed, but only an equitable interest which could be enforced against the legal representative, it would be otherwise in case of a gift *inter vivos*,—*Wildish vs. Fowler*, 5 *Times*, L. R. 113; *Farman vs. Smith*; *re Dillon Duffin vs. Duffin*, *supra*. And this may be valid although the receipt is expressed to be not transferable,—*Cassidy vs. Belfast Banking Company*, 22 L. R., Ir. 68, Ex. D. The question in this case is whether the evidence and circumstances have disclosed satisfactorily to the court, that there was a valid gift by way of *donatio mortis causa* of the Union Bank deposit receipt to the defendant, or to her and her husband.

Upon this subject it is not necessary that I should repeat the several dicta of the courts, which were fully inquired into and quoted in the judgment of this court in the estate of Murphy, 1888, but as applicable to this case, where the claim is preferred upon the unsupported testimony of interested parties. I think it advisable to sum up the principles as regards proof upon which the courts act in arriving at a decision to establish such a gift, viz: "It must be by evidence of the clearest and most unequivocal character; the burden of proof is necessarily cast on the donee in the first instance. So many opportunities and such strong temptations present themselves to unscrupulous persons to pretend death-bed donations, that there is a danger of having an entirely fabricated case set up."—15 *Moore*, P.C.C. 216, and 2 *Swans*, 200. All the minutiae of such transactions are to be examined, the effect depends upon every word and minute act. And in the same case, "To prove the facts of donation, the authorities appear not to require a plurality of witnesses, but only that the proof be satisfactory." These with other cases on similar points will be found in the same judgment. In the more recent decisions, for instance, *re Farman supra*, which was also a question of the validity of the

validity of a gift of a bank deposit receipt, Mr. Justice North said, "It was not necessary that the evidence of an interested party should be corroborated if the court considered it trustworthy, the court would look closely if uncorroborated"; but in that case I may observe there was the handwriting of the deceased donor on the back of the receipt, and it was admitted the evidence of the widow (the donee) was honest. In *re Dillon supra*, on appeal February 14, 1890, which was also a claim of a bank deposit receipt *donatio mortis causa*, it contained a statement, "this deposit receipt is not transferable." Strange to say, this was the first case before a court of appeal upon the question of the validity of such a document as a gift *donatio mortis causa*. The only witness was the donee, who was sister-in-law and executrix of the will of the donor; there was a cheque on the back of the receipt which was filled up by him payable to the bearer in his own handwriting, which he stamped and signed his name across the stamp; gave it to the donee for herself, who put and kept it in her pocket until donor's death. The court had no doubt that the deceased intended to make a present of the note to Miss Duffell (donee) in the event of his dying, and thought if any corroboration were necessary, her story was strongly corroborated by the signature of the deceased on the note. Also held a deposit receipt could be the subject of a *donatio mortis causa*; and upon the authority of Lord Eldon in *Duffield v. Elves*, 1 Bli. N. S. 530, if anything were wanted to complete the title, the donee could call upon the representative of the donor to complete it.—*Lords Justices Cotton, Lindley, and Lopes*.

In the answer of the defendant to the bill of complaint, she first says, when the deceased spoke to her alone of the money, "Whatever I have in the Bank is for you and Robert"; and afterwards, when the latter was called up to the bed-room, "The deceased, while still holding the receipt in his hand, said to the said Robert O'Keefe that he was giving that deposit to Anne (meaning defendant), and what was in it was to be hers," and he then handed it to her saying to her, "If I die all that is in that paper is yours." In her sworn testimony throughout she states the money in the deposit receipt was given to her and her husband, and he also stated, although he did not know what the paper was of which deceased said "It was for Anne and you," (meaning himself.) Again in her answer there is not a word about the deceased forbidding her to give a penny of the money to Mary Leahy or her belongings, nor is there in her

petition under the Trustees' Act, this first crops up in her's and her husband's examination before the master. If the deceased ever said so, I must say the defendant has rigidly observed any such direction. Besides the sworn-to statements of the defendant, when all the circumstances must have been fresh in her recollection, is so incompatible with this claim as to render her testimony, in my opinion, to say the least, altogether unsatisfactory and untrustworthy. It appears by the records of the court that a few days after the death of her brother, she, the defendant, presented a petition to the court, in which she stated the death of Michael, intestate, on the 2nd September, 1888; that he left him surviving as only next-of-kin herself and the children of a deceased brother; *that he was possessed of property at the time of his death of the probable value of fourteen hundred and sixty dollars within the jurisdiction of this court; and to the account which she rendered and on file before this claim was started, she gave credit to the estate "By amount drawn from the Union Bank, \$1,457," and solemnly pledged her oath that it was a just and true inventory of the goods, chattels, rights, credits, lands, tenements, and effects, which were of the said Michal Leahy, deceased, at the time of his death, and which have come to her hands to be administered, &c.*

Courts and judges cannot be too careful in closely investigating every circumstance connected with claims preferred from alleged gifts of this kind, lacking, as they do, all the formalities and safe guards which the law throws around wills, and creating strong temptation to fraud and perjury. It would be difficult to find a case that could better illustrate the propriety of this caution than the present.

The validity of a *donatio mortis causa* is a question of law, and having regard to the facts and circumstances, we are clearly of opinion that the plaintiff, as representing her children, is entitled to the judgment of the court with costs. The effect of which is that the defendant administratrix is bound justly to account with and pay over to her co-next of kin their respective shares of the estate of the deceased Michael Leahy, as the law has provided in cases of intestacy.

Mr. F. Morris, for plaintiff.

Mr. Kent, Q. C., for defendant.

1891, May. LITTLE, J.; CARTER, C. J.

Contract—Void and voidable—Non-observance of conditions—Damage by termination—Post Office Act—Construction of.

The plaintiff entered into an agreement in the year A.D. 1886 as a mail-carrier, at a yearly hiring, terminable by three months notice. In 1889 an agreement for the same service was entered into between the parties for four years, terminable by the defendant in the same way if the plaintiff did not satisfactorily perform the service. In the following year without any cause assigned, the contract was terminated. In an action for damages for dismissal and termination of contract, the defendant set up as a defence, that the contract was void and voidable for non-observance by the defendant of condition of Post Office Act, such as public notice for tender, &c., &c.

Held—That whilst in all such contracts the terms of the statute ought to be observed, yet as in this case the non-observance was not the plaintiff's, and as damage was sustained the plaintiff was entitled to compensation.

THE grounds on which the parties support their respective contentions in these proceedings are confined necessarily to very narrow limits. From the record and the arguments of counsel before the court it appeared that the plaintiff, in the month of March, 1886, entered into a contract with the postmaster general, whereby, in consideration of the sum of \$800 per annum to be paid him, he contracted to carry and convey the mails and mail bags to and from Brigus and the Railway station near that place: the contract was to continue from year to year, terminable by either party at the end of the year by a three months' notice. During the continuance of this contract the parties appear to have further agreed in the month of December, 1889, for a continuance of the service for a period of four years for the same annual remuneration, terminable at any time upon a three months' notice, &c.: provided the plaintiff did not satisfactorily carry out the service. In the month of February, 1890, the plaintiff received notice from the postmaster general that the contract would not be continued after the 31st day of March then next ensuing.

He fulfilled his obligations under the agreement, and, being willing to abide by its terms, seeks compensation or damages for his dismissal and the termination of the contract by and on the part of the defendant government.

Against this claim the grounds of defence set out in the answer were ably urged by Mr. Johnson at the argument. He contended this contract was not only voidable but void *ab initio*, because of the admitted non-observance of the conditions expressly imposed and prescribed by the 43rd section of the Post

Office Act, authorizing and enabling the postmaster general to make and enter into this class of contract.

Having given due consideration to the facts set out of record and to the construction (under the authorities) to be applied to the language of the section of the statute on which the defence rests, I consider the plaintiff clearly entitled to the judgment of the court in his favour.

On reference to the 43rd section, at page 342 of the consolidated statutes, it will be found to provide that before entering into any contract for the carriage of mails the postmaster general shall cause printed notices for tenders to be posted, &c., in the town or settlement nearest the place where the service is to be performed, &c.; on receipt of tender they are to be submitted, &c., to the Governor in Council, &c.; the one approved of, &c., shall be returned to the postmaster general, who shall enter into the contract accordingly, &c.: provided that the lowest tender with sufficient security shall be accepted, unless considered unreasonable, or that the Governor in council shall deem it to the advantage of the public interest to accept any other.

It appears these conditions were not at all times observed, certainly not in this instance, nor in relation to the contract subsequently entered in by the defendant government, and the party now performing the duties of the service in question.

It may also be observed that the exception to the legality of this contract was taken some four years after the contractual obligations had been entered into and, up to that time, admittedly satisfactorily performed by the plaintiff.

However, we have now to determine whether under the authorities and the rules of construction of statutes this section is to be construed as imperative and obligatory in its terms, and that contracts made in contravention of its conditions are to be regarded as null and void.

We find it laid down in the case of *Pearce vs. Maurice*, 2 *Ad. and E.*, p. 96, "That a clause is directory where the provisions contain mere matter of direction and no more, but not so when they are followed by words of prohibition."

Again, that express words or necessary implication are needed to cut down, abridge, restrain or *avoid* the terms of any written instrument.

The distinction between directory and imperative statutes is understood to be, that a clause is directory where the provisions contain mere matter of direction, but when it is further stated

that anything done contrary to such provisions shall be null and void, then the clause is imperative, direct and absolute,—*Wilberforce on Statutes, p. 205*. Where the statute directs that things shall be done in a particular manner, it is usually considered as directory, unless negative words are used, or other words showing an intention to treat the manner of performance as essential to the validity of the act.

And in *Marvell on Statutes, at pages 330 and 331*, the distinction is pointed out between statutes creating public duties and those conferring private rights in general; the provisions of the former are directory and the latter imperative.

On reference, therefore, to the section of the act in question, it is found to contain mere matter of direction followed by no words of prohibition, nor by implication does its language in any sense tend to make void or render illegal contracts or agreements entered into in a manner contrary to such directions; there are no negative words supporting the position assumed on the part of the defendant government.

The terms are clearly directory and must be held to be so, and not imperative; consequently the non-observance on the part of this official of the directions contained in the section does not invalidate the contract so entered into by him with the plaintiff.

The plaintiff, therefore, is entitled to recover compensation or damages for the breach of this contract, or rather for the refusal of the defendant government to fulfill its terms and conditions.

The matter is then reduced to a question of damages, and as the agreement was terminable on a three months notice, and in view of the evidence bearing on this part of the case, I consider under all the circumstances the plaintiff is entitled to a judgment in his favor for two hundred dollars with the costs of these proceedings.

HON. SIR F. B. T. CARTER, C.J. :

Having carefully considered the evidence and arguments in this action, I am of opinion the plaintiff is entitled to judgment.

Under the decisions, I regard the language of the 43rd section of the Post Office Act as directory and not imperative, in the absence of any prohibitory words express or implied.

The defendant Government in March, 1890, during the currency of plaintiff's agreement entered into another for the per-

formance of the same service without advertisement or tender, and the statute does not limit the period. There is no charge made against the plaintiff of the improper performance of his contract, and the alleged illegality is for the non-observance by the defendant Government of the prescribed directions, and not that of the plaintiff. On the surface it appears strange and inconsistent that illegality should be urged against the plaintiff's contract, while the same course was followed as regards another contractor. The plaintiff did what the statute requires of him, by giving bond with sureties for the faithful performance of the work. While I think in all such contracts the terms of the statute ought to be observed in the public interests, yet this was not the neglect of the plaintiff; and as he has shewn damage from the defendant Government causelessly in law terminating the contract, he should receive compensation for his loss.

Considering all the circumstances, I think the plaintiff should receive two hundred dollars with costs of suit. and adjudge accordingly.

Sir J. S. Winter, Q. C., for plaintiff.

Mr. Johnson for defendant.

PITTS *v.* O'DWYER, ET AL.

1891, *May*. HON. MR. JUSTICE PINSENT, D. C. L.

Revenue—Customs' Management Act—Construction of—Violation of—False reports—Seizure vessel and goods—Detention—Fine—Damages.

The plaintiff, prosecuting a trading voyage on the Labrador and Newfoundland coasts, was seized by a customs' officer for making false reports, passing a port of entry having on board dutiable goods not entered, and for other violations of the customs' law. A fine of \$400 was exacted under compulsion, and goods on board confiscated. In an action for damages for wrongful seizure the jury found that the law had been violated, but that the fine had been exacted under compulsion. The plaintiff moved to have the verdict on the law issues entered for him, and the defendant on the main issues as well as on the finding in favor of plaintiff. The plaintiff relied on the grounds, (a) no importation; (b) no authority to seize; (c) no right on Labrador to seize more goods than sufficient to pay duty on cargo not entered; (d) that there was an appropriation without an adjudication.

Held—(1) There was an importation contemplated by the Act that is "a bringing in of goods"; (2) that the officer, being a tide-waiter for the colony and acting under official instructions, had power to seize. His power is not limited to the

precinct to which he is nominated ; (3) the whole of the Customs' Management Act applies to Labrador in addition to the sections specially applying to that dependency ; (4) plaintiff lost all right to possession of goods as soon as they became subject to forfeiture ; (5) the fine cannot be allowed as it was not voluntary or free.

THE plaintiff in this action claims damages for the wrongful seizure and detention of the schooner *Sunrise*, and of certain goods forming the cargo of that vessel. He also claims to recover a sum of four hundred dollars which the defendants are said to have unlawfully compelled him to pay.

The defendants are sued for alleged wrongful acts committed in their capacities as officers of customs, the first as Receiver General, the head of the customs' department, the second as a preventive officer and tide-waiter, in the same department.

The plaintiff's case is that he was the charterer of the *Sunrise* for the prosecution of a trading voyage upon the coasts of Canada and Newfoundland, particularly at Labrador (which belongs partly to the Dominion and partly to this colony) ; that he left Halifax, N. S., in the Dominion of Canada, in May last to prosecute that adventure.

He states that he received from the collector of customs at Halifax two clearances—one of goods taken out of bond there, the other of goods purchased there by the plaintiff in the ordinary way. The first-named goods he cleared for Flower's Cove, on the west coast of Newfoundland *via* Esquimaux Point, on Canadian Labrador ; the second for Esquimaux Point itself. The plaintiff sailed for the last-named place, and there, as he states, entered *all* his goods, the collector there keeping the clearance of the goods which had not been taken out of bond. There, it need hardly be said, the plaintiff had no duties to pay.

The plaintiff then called and traded at several Canadian Labrador ports, and next entered (not Flower's Cove), but Blanc Sablon, on the coast of Newfoundland-Labrador. Here he entered with the sub-collector (Mr. Cormack) only those goods which had been taken out of bond in Halifax, described in his only remaining clearance, with the addition of a small quantity of other goods, but not including salt or casks, and not including the great bulk of his cargo. He states (which it will be seen is totally denied) that he informed Mr. Cormack, the collector, that he had a lot of goods besides, which he intended taking back to Canada ; and that this collector informed him that he should not be molested by the custom house officers in the Straits of Belle Isle.

The plaintiff then proceeded to Forteau, Labrador-Newfoundland, a port close to Blanc Sablon, and there he states he sold to the people \$130 worth of goods, because he found them in a destitute condition.

The next day the defendant, Kelly, who was in the employment of the Newfoundland government as a customs' detective, boarded the plaintiff's vessel at Forteau.

The plaintiff admits that he then informed this defendant that he had only entered at Blanc Sablon all the goods which were not intended to go back to Canada, and that he had given no bond regarding them; that Kelly then said he (the plaintiff) would have to proceed to Bonne Bay (a near port of entry on the west coast of Newfoundland with which there is telegraphic communication with St. John's); that he (plaintiff) wanted to settle the matter with Kelly there (at Forteau), but the latter declined to do so, and they then proceeded with the vessel and cargo to Bonne Bay. At that port telegraphing took place, to which particular reference will be made by me hereafter; and after two or three days, an officer being left on board the ship in the meantime, Kelly came alongside and said that he had "orders to confiscate the cargo."

The cargo was then unladen and landed with the exception of some goods which corresponded with the entry at Blanc Sablon.

After this Kelly informed the plaintiff that he was fined \$400, without payment of which he could not release his vessel. The plaintiff, after some demur, paid this sum to Kelly, taking a receipt for it, and the vessel was released on the 5th July, and returned to Halifax.

The plaintiff claims that in consequence of these proceedings he had to abandon his trading voyage; that he had paid \$675 for the charter of the vessel, and that he lost the value of goods he had sold at Labrador, and which he would probably have been paid for if he had prosecuted his intended voyage; that his nett profit would have been \$1,000, and that the value of the goods seized was \$2,512.

The plaintiff, in his examination, admits that he had on board 150 to 160 barrels, some of them containing salt, and that the total value of the goods taken out of bond was only \$360.

The plaintiff's evidence was taken before an examiner, and exhibits the most reprehensible and suspicious conduct upon his part in absolutely refusing on cross-examination to answer reasonable questions which were put to him.

The plaintiff's case was fortified by the testimony of his mate, who was also the owner of the ship *Sunrise*, and by the evidence of a number of persons examined under commission in Halifax, directed to proof of a usage existing, as they allege, for many years to which they were parties, and to which they also say Newfoundland customs' officers were consenting, of reporting and entering only those goods alleged to be intended for sale on coasts belonging to Newfoundland.

It will be, in my judgment, wholly unnecessary to spend any time in discussing the evidence of these Halifax traders. It simply goes to shew, so far as it is worth anything, that a system had existed which should never have been tolerated; a practice which should at the first opportunity be suppressed; one to which the maxim *malus usus abolendus est* is of the most emphatic application.

At the close of the plaintiff's case counsel for the defendants moved for a non-suit, or rather, to put it consistently with the present practice, moved for the dismissal of the action, and for the entry of judgment for the defendants upon various grounds, which will be the subject of discussion in this judgment.

I reserved the points and left the defendants to go to the jury, and they on their part produced in evidence Mr. Cormack, the sub-collector at Blanc Sablon. This witness states that to him the plaintiff produced his Halifax clearance of goods taken out of bond, and gave him a memorandum of the goods he reported for entry, and for these he (Cormack) gave the plaintiff a clearance.

In reply to the question from the plaintiff whether that clearance would free him, Cormack said that certainly it would if he had nothing else on board and had made a true entry; and the plaintiff paid him as duty \$63.83.

On cross-examination this witness admitted that he never took a report or required one to be signed in a regular form, but that if a ship-master reported that he had goods on board for Canada he would have put them in bond until his return; and he adds, "those who swear that I gave them permission to take their goods to Canada without reporting swear falsely. He (plaintiff) led me to believe it was his whole cargo, and on that understanding I gave him the clearance."

The defendant Kelly, who is next examined, puts in his commission as a preventive officer for "the north-west coast of this island," and deposes that he was also acting under verbal instructions from the Receiver General, and was, moreover, a

tide-waiter for the colony generally. He states that his instructions for watching ships covered as far north as Henley Harbor on the Labrador side and Cape Norman on the Newfoundland side of the Straits of Belle Isle. On the 27th of June he went into Forteau, within those limits on the Labrador coast, and found four or five boats alongside the *Sunrise* with a quantity of goods in them, laden from on board that vessel, such as flour, salmon barrels with salt, molasses, pork and beef. The hatches of the vessel were off and her deck full of provisions fore and aft. The mate was opening barrels of pork, and there was a regular shop in the cabin, full of drapery and other goods.

The plaintiff produced his clearance which, he stated, covered everything except a few articles for the Dominion not reported. This witness remarked, "A man is bound to report everything," to which the plaintiff replied that he knew that, but he had forgotten it, adding that he would do no more trade until the matter was settled.

The plaintiff then made out a new list of goods for entry, and the witness inquired of him how it was that many articles (which he named) that were necessary for Newfoundland waters did not appear on this list. To this the plaintiff replied that he was in the habit of entering only the goods he had taken out of bond. Kelly asked him if he expected to get a load of salmon for what he had entered. This witness then saw him alter a list of goods he had, *e.g.*, by substituting 100 barrels of flour for 135, and one barrel of sugar for two barrels, and he handed to witness the altered list, which he said contained the few things he forgot to enter at Blanc Sablon.

Upon further questioning the plaintiff yet added to the list, dry goods, boots and shoes, salmon barrels and salt, oil-clothes and twine, and begged the witness to accept this now again amended list as a due entry, to accept the duties, and not make a victim of him. He refused to say what duties he had paid at Blanc Sablon, and offered to inform the witness of other Canadian traders who had done the same as he had.

The witness informed him that the matter was too serious a one for him to deal with, and advised him to proceed to Bonne Bay where he could communicate with the government. The plaintiff remarked that he feared it would cost him \$3,000. The result was that the plaintiff's mate and crew stowed away the goods again, and, with the aid of some of Kelly's crew, they weighed anchor and proceeded to Bonne Bay.

In the meantime a customs' schooner (the *Garland*) had sailed to Blanc Sablon to get the original entry, and she joined the *Sunrise* afterwards at Bonne Bay. The proceedings and result there were substantially the same as they have been related by Pitts,—all the goods not reported were seized and unladen.

Plaintiff likewise paid the fine of \$400, and, as a significant fact connected with that payment, he appears to have made it half in Newfoundland money, upon which Kelly remarked that he must have been doing a good Newfoundland business. On cross-examination Kelly denies that he seized the vessel, but he took possession of the vessel and detained her until the truth was found out, and that at Forteau he accused the plaintiff of violating the 10th and 11th sections of the Customs' Management Act, but he does not remember mentioning then the 109th section. The goods were brought on to St. John's and sold by the customs. The quantity seized and sold proved to be double the amount which the plaintiff admitted at Forteau he had not entered.

The evidence of Kelly is, in a general way, confirmed by the master of the cutter *Garland*, a revenue cruiser.

The defendant (O'Dwyer, Receiver General), was called, and swore that Kelly was last year one of the customs' officers on the Labrador and Newfoundland coasts; that upon receiving information from him, he held a meeting of the Board of Revenue, the result of which was communicated by telegraph. The goods were ordered to be confiscated, and the plaintiff was fined \$400 for breach of the 10th section of the Customs' Management Act. He admits that his orders were, if the fine was not paid not to let the vessel go. The goods were confiscated and sold according to the practice which had always prevailed in his department.

The telegrams put in evidence were the following:—

[COPY.]

BONNE BAY, JUNE 28TH, 1890.

To Hon. Receiver General:—

Schooner *Sunrise*, with general cargo on board, entered at Blanc Sablon; paid sixty dollars duty. I seized schooner at Forteau, and brought her to this port. Found on board one hundred barrels flour, six puns. molasses, seven bbls. bread, one box tobacco, five half-chests tea, quantity dry goods, leatherware, and many other articles on which duty was not paid; awaiting instructions.

WM. KELLY.

Received for by
R. H. O'DWYER.

[COPY.]

BONNE BAY, JUNE 28TH, 1890.

To Hon. R. O'Dwyer :—

Entered at Blanc Sablon ; collector informed me would not be molested. Trade largely on Canada side ; intended to bring lot of return cargo back.

JOHN W. PITTS.

Received for by

R. H. O'DWYER.

[COPY.]

BONNE BAY, JUNE 30TH, 1890.

To Hon. R. O'Dwyer :—

Officer Kelly boarded my vessel at Forteau, where I was doing a legitimate business, selling only goods on which duty had been paid. Kelly prevailed on me to proceed Bonne Bay and pay duties on entire cargo, with view extending my voyage north after reaching here. I fear he has misrepresented the case to government, and endeavouring to make case wilful violation of customs, thereby securing to himself coveted prize. All I want justice done me.

JOHN W. PITTS.

Received for by

M. O. FARRELL.

[COPY.]

JUNE 30TH, 1890.

To William Kelly, H. M. Customs, Bonne Bay :—

All goods not reported by schooner *Sunrise* you will confiscate, and place same in charge sub-collector, Bonne Bay, to my order. You can release that vessel on payment of fine of four hundred dollars in cash.

Answer.

RECEIVER GENERAL, ST. JOHN'S.

[COPY.]

BONNE BAY, JULY 1ST, 1890.

To Hon. Receiver General :—

Have possession of a large quantity goods ex *Sunrise*. Fine paid ; schooner released.

WM. KELLY.

Received for by

MARY HARRIGAN.

This was in substance the evidence on both sides, which I carefully reviewed and sent to the intelligent special jury which tried the case ; and I put for them in writing, at the close of my summing up, the following directions, to which they gave the answers appended :—

QUESTIONS FOR THE JURY.

"Under the whole evidence, if you find the vessel was seized for violation of section 109, in passing a port of entry, or entering a port not of entry, with goods subject to duty and upon which duties had not been paid; or if you find the detention was only the necessary consequence of her having goods on board which were liable to forfeiture, for the purpose of dealing with those goods; or if the detention arose by arrangement with the plaintiff, or by his own act or assent in view of the difficulties he had created for himself by violation of the Customs' Management Act, you will find for the defendants upon the first count."

Answer: "*For the defendants.*"

"You will say, in connection with this charge and in a separate answer, whether it is true or untrue that the collector at Blanc Sablon gave the plaintiff permission to take goods to Canada without reporting them?"

Answer: "*We believe it to be untrue.*"

"Upon the second count you will find whether the sum of \$400 was paid by plaintiff under compulsion, or whether it was voluntarily paid in lieu of penalties incurred under the Customs' Management Act and to relieve his ship from lawful detention? If paid upon compulsion you will find for the plaintiff upon this count for \$400; if otherwise, you will find for the defendants. In determining this last question you will consider whether the vessel was detained only as the necessary consequence of having smuggled goods on board and with reference only to that offence, as, if so, the threat not to release the *ship* until the fine was paid would be illegal, as a vessel is not liable to confiscation merely upon charges for violation of any section of the Customs' Management Act, except under section 109."

Answer: "*For the plaintiff, having been paid upon compulsion.*"

The plaintiff now seeks to have judgment entered for him upon the law of the case, and upon or notwithstanding these findings; while the defendants contend that they are entitled to judgment, not only upon the main issue, but also upon the finding in plaintiff's favor for the \$400 fine; and the parties leave to the court, without recourse to another jury, the determination of matters of law and fact, and the assessment of damages, if necessary.

At the argument Sir J. Winter for the plaintiff, stated that "he raised no question as to the seizure of the schooner, and the verdict with regard to her," and claimed no damages now on that account, as the damages were substantially dependent upon the question of the legal or illegal seizure of the goods.

At the argument the four positions taken on behalf of the plaintiff were: (1) That there was no *importation* according to the meaning of the acts, the provisions of which applied only to goods brought in for sale or consumption here, which those

in question in this action had not been, and moreover they were allowed to pass with the knowledge and consent of the custom house officer at Blanc Sablon; (2) That the defendant Kelly had no authority to seize the ship or goods; (3) That there is no right at Labrador to do more than seize the goods imported, and to dispose of sufficient to pay the duties; (4) That there was an appropriation and conversion of plaintiff's property by the defendants, in their having declared the goods confiscated without an adjudication. Then as to the finding in favor of the plaintiff for \$400, the plaintiff says that the fact was found that the fine had been paid under compulsion, and that moreover as a matter of law, there was an entire absence of authority to detain a ship for the purpose of enforcing the payment of a personal fine on the master; and that there was no authority in the board of revenue to inflict such a fine; that therefore the plaintiff was entitled to entry of judgment upon this count.

Mr. Morris (Acting Attorney General) and Mr. Johnson for the defendants. contended that this plaintiff had violated every possible section of the Customs Management Act; that he rendered his ship, as well as cargo, liable to seizure and forfeiture under the 109th section of the Customs Management Act, and that the goods were also so liable under sections 10, 11, 17, and 80; and that the fine was properly imposed and enforced under the 10th section, and that its payment was a voluntary payment and not a compulsory one; that it was at least a payment made of an amount which the plaintiff was bound to pay, and that it could not therefore be recovered back.

That as to Kelly's authority it was abundant, not only from the various positions he held and the instructions he received, but under the general powers conferred by the act. That the act applied equally to Labrador and the island of Newfoundland, expressly including the "dependencies" of the colony, while at the same time there were some special sections for Labrador, which were cumulative and intended to meet its peculiar circumstances at times and seasons when there were no officers upon the coast, and no accessible custom house or means of entry.

As to formal adjudication or condemnation of forfeited goods, there was no necessity to adopt such a course; if they were wrongly confiscated an owner would have the remedy by action such as the present plaintiff was now pursuing; and that as he had, and has no right of possession in the goods in this case,

he has no right of action by reason of any disposition of them by the defendants.

Mr. Horwood in a careful and ingenious argument replied for the plaintiff on the whole case.

The first point taken on behalf of the plaintiff deserves little or no consideration.

The importation contemplated by the act is manifestly to be regarded in its plain, strict and unlimited sense, "the bringing in" of goods. Far from there being any express terms or implied conditions confining the obligation of report and entry to goods intended for sale or use in this colony, every section relating to the question (the 10th, by way of example) requires the fullest and most particular report of all goods, "the marks, numbers and contents of every package and parcel of goods on board," &c. &c.; and there are specific provisions in the act with regard to warehousing and giving bond in the case of goods imported, but intended for future exportation.

It would be an unnecessary waste of time to discuss this point further. Its untenability is obvious. But as a matter of fact, it is superabundantly evident that the goods on board the *Sunrise* were imported for sale within the territory of this colony, to any extent sale could be made of them, and had already at the time of seizure been partly sold.

With regard to the other matter of fact associated by the plaintiff with this first point, that of permission to the custom house officer to violate in so material a feature the act he was appointed to enforce, we have the positive denial of the sub-collector himself; and were this not so, no such alleged connivance on his part would avail the plaintiff.

As to the next point, that the defendant Kelly had no authority to exercise the duties of a custom house officer upon the occasion in question, I have no hesitation in holding that it was quite within the scope of his duties; in fact that it was particularly his duty as "preventive officer on the north west coast of this island" to look after smugglers in the Straits of Belle Isle; and to take all necessary and lawful measures to bring to punishment the violaters of the revenue laws of this colony and its dependencies. Moreover, he was a tide-waiter for the colony, and even if he had not been a commissioned officer, he was acting under official instructions from the proper department.

The plaintiff would be unable to sustain his action against the Receiver General (O'Dwyer) as joint trespasser with Kelly,

unless the latter were acting as an officer of customs, and if he was only committing some personal trespass. The plaintiff sues him as an officer of customs. But again, if there were any doubt upon this point, it would be entirely removed by the general powers given under the "Customs' Management Act, 1882," in various sections; by way of example, the following:—

"XVII.—Any officer of revenue may go on board any vessel being within three miles of any of the coasts of this island or its dependencies, and stay on board while she remains in port or within such distance; and may examine on oath the master of such vessel touching his cargo and voyage; and if such master do not truly answer to the questions put to him, he shall forfeit the sum of two hundred dollars."

(See *R. vs Barfoot*, 13 E., 506, as an authority to shew that the power of a custom house officer to seize goods is not limited to the precinct to which he is nominated, and 2 *Smith*, 220, that an extra man may justify under an excise officer though no regular officer be present).

Here, however, Kelly was a regular officer. Upon the third point, that there is no statutory right to seize and sell goods at Labrador beyond the necessity of realizing the amount of duties because of the terms of section 93, I have to observe that this is only one of many sections having varying applications, and this one applies to the "importer" at Labrador being the "proprietor," failing to make due entry. It is a section of special application. Its effect is not to annul in any way the operation of other sections of the statute, which expressly extends to this island and its "dependencies," and which are in some instances made *nominatim* to apply to Labrador, *e.g.*, by section 92:—

"All goods landed at Labrador shall be subject to the duties imposed upon the like goods imported into any part of this island or its dependencies, and to the same laws, rules and regulations as though they were on board the importing ship on arrival before such landing," &c., &c.

There is, for instance, nothing to relieve the master of ships from reporting and observing the conditions of section 10. Again, section 109 relates to goods imported into the "dependencies," of which Labrador is the principal, and that section provides that,—

"If any vessel with dutiable goods on board enters any place other than a port of entry (unless from stress of weather or other unavoidable cause), such goods (except those of an innocent owner) shall be forfeited, together with the vessel in which the same were imported."

Under section LXXVIII. : "All vessels, boats and goods which shall be seized as forfeited under this Act, shall be deemed and taken as condemned," &c., unless the owner gives a prescribed notice.

With regard to the fourth contention, that there had been no adjudication of forfeiture, that point has been met by the extracts from the statute above given ; but if a judicial condemnation is contemplated by the Act as affording confirmation and as evidence of estoppel in such cases, this is clear, that unless the original seizure was unlawful the plaintiff had ceased to have any right of possession as soon as the property became the subject of forfeiture. He might, probably, under some of the provisions of the Act, require the law to be put in motion if he desired it ; or if, as in this case, he treated the seizure as illegal, he could, as he has done here, take his action at law.

In the case of the *Annandale*, L. R., 2 Probate Div., p. 218, it was held by the Court of Appeal affirming the decision of the judge of the Court of Admiralty, "that forfeiture accrued before seizure, and before the institution of any suit, at the time when the illegal and fraudulent act was done, and that it divested out of the owner the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture."

This was the case of a ship which had wrongfully assumed the British national character, and the words of the Act were "such ship shall be forfeited to Her Majesty." In this case the language of section 10 and of other sections applicable to the circumstances of this case, is "and if any goods be not reported such goods shall be forfeited."

In the case of *Wilkins & or v. Despard*, 5 T. R., 112, citing with approval still older cases, it was held that the owner of a ship seized as forfeited under the Navigation Acts could not maintain trespass against the party seizing, "although the latter do not proceed to condemnation ; for by the forfeiture the property is divested out of the owner."

This may be taken as established and as indeed unquestionable law. (And see, as an authority for right to detain upon reasonable suspicion, *Clark v. Chamberlain*, 2 M. & W., p. 73.)

True, it is that by section 114 of the act "all penalties and forfeitures incurred thereunder may be prosecuted, sued for and recovered in the court of vice-admiralty, or upon information and without a jury in the supreme court, or before a justice of the peace," &c., and this is an enactment useful no doubt

for the protection of officers if they desire to avail of adjudication, even with regard to goods—one which it may not be safe to dispense with in the case of the sale and conveyance of a confiscated ship, and which is absolutely necessary for the enforcement of personal penalties.

I am unable to arrive at any other conclusion upon the evidence in this case, than that the findings of the jury in a general way upon the questions left to them upon these points were substantially correct; and that this court, to which is now left the determination of both law and fact, should direct a verdict for the defendants, and order judgment to be entered accordingly.

I have no hesitation in saying that it would be difficult to conceive a more audacious action than this, springing out of circumstances justly described as bringing home to the plaintiff (who made no less than three false reports in the space of a few days, besides two false clearances) the violation of nearly every section of the Customs Management Act which it was possible for him to transgress.

Fortunately for the plaintiff, the revenue department did not insist upon proceeding for the condemnation of his ship, under section 109, but permitted him to go away with her.

I now arrive at that part of the case in which the defendants seek to have judgment entered for them, upon the count under which the jury has found for the plaintiff in the sum of \$400.

I am of opinion that as this was a personal penalty, admitted to have been inflicted upon the master under section 10 of the act, for not reporting according to its provisions, the payment should have been perfectly voluntary and free to have obviated the necessity of proceedings at law. In the face of the Receiver General's telegram and of his own evidence, "if the fine was not paid, I would not let the vessel go," it cannot reasonably be held or contended that the payment was not made by the plaintiff under compulsion and duress, or that the defendants were not exceeding their lawful authority in enforcing by such means the payment of a fine to which the *ship* was not liable to respond. The verdict for the plaintiff on this claim ought to be sustained, and judgment entered for him.

We are relieved from the necessity of entering into the question whether the vessel was seized by Kelly as forfeited or only temporarily detained. The fact would seem to be that she was only taken in charge to the extent which was necessary for dealing with the forfeited goods on board of her; and it is a

curious fact that while Kelly, perhaps boastfully, states in his telegram that he seized the ship, the plaintiff, on the other hand, states in his telegram "Kelly prevailed on me to proceed to Bonne Bay."

While on the one hand it is, under the circumstances, eminently satisfactory to be enabled upon the principal issues to reject the plaintiff's claims, I feel, on the other hand, that one ought not to pass over this case without observing upon the great laxity, not altogether to be accounted for by the characteristics of the situation, which appears to prevail in the execution of the revenue laws upon the coasts of Newfoundland and Labrador; moreover, I would impress upon the authorities here the desirability in certain particulars, to which reference has been made in this judgment, of pursuing a practice more consistent with their statutory powers than, for example, the manner of enforcing the fine in the present case, and of avoiding some errors into which a long course of mistaken and hitherto unquestioned authority seems to have led them.

Sir J. S. Winter, Q. C., and Mr. Horwood, for plaintiff.

Hon. E. P. Morris (Acting Attorney General), and Mr. Johnson for defendants.

COLLINS v. COLLINS, EXR.

1891, May. HON. SIR F. B. T. CARTER, C. J.

*Executor—Bill praying for account—Estate property—Sale of—Purchase by
Executor—Collusion with other legatees.*

Plaintiff filed a bill against the defendant executor praying that an account might be had of estate property, and charging defendant executor with fraud and collusion with other legatees in the realization of certain assets of estate. It was admitted that the defendant executor had employed, as did also his daughter, parties to appear at the sale and bid the property up, and to one of these it was ultimately knocked down, and subsequently assigned to the defendant.

Held—There appeared to be nothing of a collusive or fraudulent character in the sale or purchase to render it void.

The plaintiff is joint executor with the above defendant, James R. Collins, of the will of their late father John Collins, who died in the year 1854. The original bill in this case was

filed against the said James R. Collins, alleged managing executor, praying that an account of the said estate may be taken, and the plaintiff decreed to be paid the amount due him. In his answer the said defendant (James R. Collins), asserted that the accounts of the said estate had been duly filed up to the end of 1877; that plaintiff had inspected the accounts to the end of 1886, and acknowledged their correctness; and he appended to his answer a further account to April, 1888; this defendant also stated, the plaintiff had been declared insolvent in 1885, but no trustee of his estate had been appointed; that he had always been prepared justly to account with the plaintiff, and had done so, and submitted himself to the direction of the court. All the other defendant's legatees, in their respective answers, declared themselves satisfied with the accounting and management of the estate by the said James R. Collins. With consent, the case was set down for hearing upon bill and answers, and argued by counsel. The court ordered and decreed that it be referred to the master to enquire into the accounts as filed, but not anterior to the 1st January, 1888; also as to what portion of the estate remained undistributed; also as to the parties entitled to participate, and the share to which each was entitled, and to report the result of his enquiry, &c. After some evidence had been taken it was found, in confirmation of the answer of the said James R. Collins, that the only asset undistributed was the value of a dwelling house in Duckworth street, which had been sold and credited by the last-named defendant in the account filed with the answer at \$2,160 amount of sale, and a sum for rent received from the tenant; but the plaintiff being dissatisfied with the sale, and before the master had reported, filed a supplemental bill charging that the sale of the house was fraudulent and collusive between the said James R. Collins and certain of the legatees, which was denied by the said James R. Collins in his answer, setting forth the circumstances connected with the sale, and his position was sustained by all the others interested except the plaintiff. The master was not required by the parties to report upon the reference to him, and arguments of counsel were heard upon the supplemental bill or petition, answer and evidence taken before the master. It appeared that some of the legatees had been pressing for the sale of the house and the winding up of the estate, which said James R. Collins and others interested communicated to the plaintiff, who replied, "You may sell or do as you please with it, he had all he expected to get out of it."

The premises were accordingly advertized for auction in the public papers, and after several bids from a number of persons present, were sold to the highest bidder, Mr. James J. Callanan, for \$2,160; the plaintiff was present at the sale and said the estate was in litigation and he had a claim.

To prevent a sale at undervalue, the said James R. Collins employed a person to bid up to \$2,000, and it appears the daughter of the latter, unknown to him or others, had also employed the person who became the purchaser, who afterwards assigned to the said James R. Collins, Thos. D. Collins and Matilda Thomey, brothers and sister, co-legatees, for the like consideration. It also appeared that the plaintiff had by indenture mortgaged in 1876 his share (one-fifth) of the property in question for \$400, with interest at 6½ per cent. per annum, for the payment of which the said James R. Collins and Thomas D. Collins gave security. And said James R. Collins, in October, 1888, on demand of the mortgagee, paid the principal sum and \$26 interest, who assigned by arrangement to John T. Collins in the last-named month and year, which said mortgage charge is still subsisting. Also, it appears by the records in court that the plaintiff was declared insolvent in July, 1885, and in the schedule annexed to his petition valued his interest in his late father's estate at \$400, subject to mortgage.

The law properly is very strict in discountenancing the purchase by trustees or executors of any of the assets of the estate entrusted to them, and are not permitted under any circumstance to derive *peculiar* benefit from the manner in which they transact the business.—*Smith, E. Q 95; Luff vs. Lord, 34; Bear. 220.* There must be no fraud, concealment or advantage taken, and if there be, a public auction will not condone.—*Smith, 224.* An executor shall account to the utmost extent of advantage made by him of the subject so purchased.—*Williams on Exrs., 943-957.* Applying these principles to this case, there does not appear to have been any fraud or unfair advantage taken, the sale was public, with the concurrence of the plaintiff, and there is no proof whatever that the premises were of greater value, or that more could have been obtained for them than the highest amount bid at the auction. If there had been I should have no hesitation in annulling the sale; but when those who have the larger interest are satisfied, and it being rather more than doubtful if the plaintiff has anything beneficial to himself remaining, it would be only needlessly pro-

longing litigation and incurring expenses, besides delaying the winding up of the affairs of the estate, which is desirable in the interest of all concerned. I am of opinion the sale should stand for the amount credited (\$2,160), with interest to date May 1st, 1891, at five per cent. per annum, to be paid to those who have not participated in the rent of the premises under the sale and assignment, upon the amount of their respective shares; and if those interested, whether as legatees or assignees, cannot agree as to the sum payable to each, and give a full release to the said James R. Collins, managing executor, there must be a resumption of the reference before the master to report, the costs of which and other costs, by whom payable, to be hereafter determined upon by the court.

Mr. G. H. Emerson, Q. C., for plaintiff.

Mr. Kent, Q. C., and *Mr. H. H. Carter*, for defendants.

BOWRING v. DICKS.

EX PARTE TRUSTEE OF DEFENDANT IN INSOLVENCY.

1891, *June*. PINSENT, J. ; LITTLE, J.

Sheriffs—Act relating thereto—Construction of—Special deputation—Liability for.

On behalf of the trustee of the defendant (insolvent after the issue of the plaintiff's writ of attachment), it was contended that the sheriff, who had granted a special deputy, was liable to the trustee in insolvency for the goods attached, and that the trustee was not bound to look to the plaintiff or special deputy.

Held—The special deputy and plaintiff, after notice and demand and failure to account, are liable to be sued, failing their ability and that of their sureties to respond, the sheriff would be liable for any loss.

THE question raised here arises under the fifth section of cap. 17, of the Consolidated Statutes, title "Of Sheriffs."

The section is as follows:—

"The said sheriffs shall grant special deputations when required for the purpose of executing process, either within or beyond the limits of their districts, or in any other part of this colony or its dependencies, when, in the latter case, such process may lawfully run beyond such limits; but the said sheriffs shall not be responsible for the execution of such process by special deputation, but shall require the party applying for such special deputation to give security for the faithful execution of the process; and the party so applying and his sureties shall be liable to third parties for

injury arising in or about the execution of the process in the same way as the sheriff would have been liable to such third parties : provided that the sheriff shall be responsible for having taken insufficient security."

For the first time the construction of this enactment has been called in question with regard to the responsibility of the sheriff in relation to "special deputations."

On behalf of the trustee in insolvency of the defendant (who was declared insolvent after the issue of the plaintiffs' writ of attachment), it is contended that the sheriff of the central district is liable to account to the trustee for the goods attached under the writ in question, and that the trustee is not bound to look to the plaintiffs or to the special deputy.

The writ has been before us upon a former occasion upon a rule to the sheriff to return the writ. His return now runs thus: "I executed the within writ by appointing a special deputation at the request of the plaintiffs. The return of the special bailiff is hereto annexed"; and with this return is a list of the property attached.

At the hearing of the present motion there have been produced: (1) the form of deputation granted under the section; and (2) the bond from the plaintiffs to the sheriff required by the section upon the appointment of a special deputation.

The enactment is plain in relieving the sheriff in such cases from all liability, except for taking insufficient security.

It is equally clear that the party (plaintiff) taking a special deputation and his sureties are responsible to third parties for any tort arising in the execution of the deputation.

In this case it seems the special deputy delivered the goods attached to the plaintiffs themselves, and it is alleged that they decline to hand the property over to the trustee in insolvency. The trustee now desires to be instructed as to whom he is to sue for the possession of this property as assets of the insolvent estate.

We are of opinion that the special deputy and the plaintiffs are, after notice and demand and failure to account, the parties liable to be sued; but, failing their ability and that of their sureties to respond to such liability, the sheriff would become liable for any loss.

The order we now make is that the sheriff amend his return by attaching thereto the "special deputation" paper and the plaintiffs' bond, so that they may be available in court for further proceedings.

1891, July. HON. MR. JUSTICE PINSENT, D.C.L.

Practice—New trial—Revenue—Customs' Management Act—Construction of False Reports—Seizure—Fine—Detention—Damages.

The plaintiff, prosecuting a trading voyage on the Labrador and Newfoundland coasts, was seized by a Revenue officer for making false reports of goods on board his vessel. Penalties under the Act were imposed on plaintiff. In an action for damages the jury found for the defendants. On a motion for a new trial on the grounds that the vessel was not liable to seizure, and no authority to arrest and detain vessel,

Held,—That it is a necessary incident to seizure of goods which have become forfeited that the offending vessel should be taken and detained for a reasonable time. A vessel is not free from subsequent seizure because she has made an entry upon a false report; and especially is this true upon a substantive offence.

THIS case was tried before me with a special jury in the last term of this court. The facts are mainly these, viz.: that the plaintiff chartered from David Webber (who was master as well as owner of the vessel) the schooner *Surprise* to prosecute a summer trading voyage from Halifax, N. S., to Labrador and the coast of Newfoundland. The vessel left Halifax in May last, with about \$5,000 worth of goods on board. After leaving Canadian Labrador, the vessel went to Blanc Sablon, the first port of call on that coast within the Newfoundland territory. There the master entered the vessel, and obtained a clearance coastwise. Thence she proceeded to Forteau, West Ste. Modeste, Red Bay, and Black Bay on the same coast; then she crossed the Straits of Belle Isle to Newfoundland, and went into Quirpon, then back to Henley Harbor (Labrador), thence back to St. Anthony, Goose Cove, Croque and Conche, from Conche again to Croque, Goose Cove and St. Anthony's Bight, where on this last occasion she arrived on the eleventh July.

At Croque Customs officer Tuck, in the revenue schooner *Phoenix*, boarded the *Surprise*, and upon examining the clearance discovered, as he observed to the master, that the clearance shewed a very small quantity of goods for a trader; and he was about to search the vessel, but she escaped and went to Goose Cove, where the defendant Forbes boarded her. To Forbes the master presented his clearance from Mr. Cormack, the sub-collector at Blanc Sablon, and after accepting excuses from him for not entering all his goods at first, Forbes allowed him to amend his report and gave him a fresh clearance upon payment of \$101 additional duty.

The *Surprise* is next seen by the officers of Customs at St. Anthony's Bight, and it was observed by them that there were articles of merchandize on board that had not been yet entered, and upon which duties had not been paid. A thorough search was then made, with the result that there were found on board goods to the value of \$631, instead of \$266 as reported at Goose Cove.

The defendant Forbes then, as he states, "took charge of everything on board the vessel"; or, as Webber, (the master) says, "Forbes seized the vessel," and would not be prevailed upon again to let him go, although he offered to pay the full duties, or to give up the remaining goods. Forbes advised him to go to the Board of Revenue in St. John's to settle the matter. The witness Webber admits that he had been selling goods on the Newfoundland coasts wherever he could make a sale of anything.

The version Forbes gives of the matter of the detention of the ship, and corresponding in effect with that of the other witnesses, is: "I suggested to Webber his going on to Saint John's. I did not give up charge, as he had acted so it was my duty to take charge of the vessel and goods until the demands of the law were complied with. I kept charge and sent her to St John's with Webber's consent. I seized the vessel in the sense of taking charge, not of confiscating her. He (Webber) seemed to have sailed his vessel through the whole act."

The result was that Webber, the master of the *Surprise*, came on to St. John's in the mail steamer *Conscript*, and his vessel, with the greater part of his crew, and in charge of Tuck, followed him there. This was on a Saturday. The *Surprise* arrived in St. John's on Thursday following.

At St. John's the Board of Revenue and Webber held negotiations, resulting in the latter giving a bond for payment of penalties (\$600), and paying the remaining unpaid duties, and on the succeeding Monday leaving in his ship, with the goods released, to resume the prosecution of his trading voyage.

The plaintiff Arnould (Webber's principal) complains that these proceedings on the part of the Customs authorities in this country were illegal, and he claims damages in this action for alleged loss, arising from the interruption of the voyage and by the falling off on the market for furs and salmon at Halifax by reason of the vessel arriving there later than she would otherwise have done.

At the close of the plaintiff's case I was asked to dismiss it.

and I then entertained no doubt that this impudent claim deserved to be so treated; but I thought that, on the whole, it was better that the entire facts should come out, and if it were desired that the whole court should have an opportunity of passing upon them.

At the recent argument it was contended for the plaintiff that the vessel was not liable to seizure, although it was admitted that as to the goods and the master's conduct, various sections of the Customs' Management Act had been violated in so many particulars as to represent a very large aggregate of penalties.

It is unnecessary to enumerate and set out these sections and particulars. I proceed to the only point upon which the plaintiff now attempts to rest his case, viz., that there was no violation of the Customs' Management Act which justified the arrest and detention of the vessel.

This point involves three aspects, (1), whether under section 109 of the Customs' Management Act, the ship was, under the circumstances, subject to seizure and confiscation; (2), whether, for the purpose of dealing with the cargo, it was a necessary incident that the vessel should be taken possession of and detained for a reasonable time; (3), whether her detention prior to her release at St. John's was the result of an arrangement with the master, for the purpose of giving him an opportunity of settling his self-imposed difficulties with the Board of Revenue.

Upon the last point, which is purely a matter of fact, the jury found for the defendants. Upon the second point it seems to me there can be no doubt that it is a necessary incident to seizure of goods which had become forfeited, and to subsequent proceedings on that account, that the containing and offending vessel should be taken and detained for a reasonable time. Upon the first point, as to the liability of the vessel herself, with a view to confiscation or sale, the provisions of the 109th section of the Customs' Management Act are as follows:—

“If any goods imported into this island or its dependencies, at any other place than some port or place of entry where a Custom-house is lawfully established, are carried past such Custom-house, or removed from the place appointed for the examination of such goods by the proper officer of the Customs at such port or place, before the same have been examined by the proper officer, and all duties thereon paid, and a permit given accordingly; or, if any vessel with dutiable goods on board enters any place other than a port of entry (unless from stress of weather or other unavoidable cause),

such goods (except those of any innocent owner) shall be forfeited, together with the vessel in which the same were imported, if such vessel is of less value than eight hundred dollars, and if such vessel is worth more than that sum, it may be seized, and the master or person in charge thereof shall incur a penalty of eight hundred dollars, and the vessel may be detained until such penalty be paid, or security given for the payment thereof; and unless payment be made or satisfactory security given within thirty days, such vessel may, at the expiration thereof, be sold to pay the penalty."

It is contended for the plaintiff that under this section a vessel having once made an entry, albeit upon a false report, at a regular port, is in herself free from subsequent seizure; that from and after that forfeitures and penalties attach only to goods and persons.

I think this contention would not have been without some force as applied to the first part of that section, and the offence there provided against; but the language of the second part which provides against another substantive offence is so clear and simple that it is impossible to say the vessel was not, in this case, brought within its provisions by the fraudulent and illegal conduct of the plaintiff's ship master and agent; she was clearly a vessel with dutiable goods on board entering a place other than a port of entry, and not from stress of weather or other unavoidable cause.

Then it is contended here, as in the recent case of *Pitts v. The Receiver General*, that this and other sections have no application to the coast of Labrador, but we have already held that the provisions of the Act are cumulative, and that to violate any of them on the coast of Labrador is as much an offence against the Act as so doing upon the coast of Newfoundland. Moreover, in this case, the offences were committed both at Labrador and in this island.

The court, therefore, is unanimous in directing that judgment be entered for the defendants.

Sir James Winter and *Mr. Horwood* for plaintiff.

Hon. Mr. Morris, (*Acting Attorney General*), and *Mr. Johnson*, *Q. C.*, for defendants.

1891, *July*. HON. MR. JUSTICE PINSENT, D.C.L.

Contract—Contractors—Breach—Discontinuance—Notice—Damages.

The plaintiffs had let a portion of their premises to the defendant government as a telegraph office, had fitted it up, and one of their firm had been instructed in telegraphy and taken charge of the office. There was no written agreement as to hiring; the salary was the receipts of office. Without notice the instruments were removed, and another person appointed operator without any cause assigned.

Held—That to terminate such a contract the plaintiffs are entitled to a reasonable notice, such as six months; in such a contract a notice is implied and should have been given.

THE plaintiffs, who carry on business at Old Perlican, under the firm of "S. March & Co.", seek to recover damages from the defendant government by reason of a breach of contract in discontinuing their services as contractors for the transmission of telegraph messages, and for the use of premises at Old Perlican for the government telegraph service.

This service appears to be under the working management of the Anglo-American Telegraph Company. It appears that, after one Potter's ceasing to hold the office of "telegraph operator" in 1887, the government made an arrangement with the plaintiffs to take up the business, and they accordingly fitted up part of their premises as a telegraph office, and an official of the Anglo-American Telegraph Company was sent to the place and established the necessary instruments in the office. The plaintiffs then took charge, and they in the first place employed one Tuff as the "operator," but he after a time resigned, and then an instructor was sent by the manager of the Anglo-American Telegraph Company to teach any person the plaintiffs might name or appoint, and Ebenezer March, one of the plaintiffs, elected to become himself the operator, and he was instructed accordingly by a person who remained with the plaintiffs for three months, and was paid \$20 per month by them. The plaintiffs were to receive as remuneration the receipts of the office at Old Perlican, which amounted for the year to about \$180.

This arrangement continued until November, 1890, when a Mr. Saunders, from the Anglo-American Company's establishment, went to Old Perlican on behalf of the government and removed the instruments from the plaintiffs' offices to that of another person, who appears to have been appointed in their

place to do the work of telegraphy at Old Perlican. No reason, so the plaintiffs say, was assigned for this change, nor was any notice of intention to make the change given, nor did it meet the approval of the manager of the Anglo-American Telegraph Company; and there appears in evidence a very numerously signed petition from the clergy and others of Old Perlican protesting against the change.

On the other hand, there is the evidence of Mr. H. B. Woods, who states that he is one of the members of the district of which Old Perlican is a settlement; and that the cause of the removal was complaints which had been made of "having a public telegraph office in a private business establishment"; and this witness states that, five or six months before the change was made he had directed the manager of the Anglo-American Company to notify the plaintiffs of the intended removal.

It is not said in the evidence that there was any government authority for doing this, but it is clear that if there was no original sanction for it, the changes thus made have been recognised and adopted; indeed there seems to be no dispute about facts; and the question for the court resolves itself into one of damages.

The action belongs to a class of cases, of which in recent years there have been numerous instances, arising upon changes of administration in the government; but we, in dealing with such cases, have only to regard the government in the light of a corporate body with a continuing existence.

The case was partly heard some months ago before the Chief Justice and myself, when it was thought desirable by the defendant government that the evidence of the manager of the Anglo-American Telegraph Company should be taken; and time was allowed for that purpose. No step has been taken to procure that evidence, and now the plaintiffs ask for judgment.

They claim to be re-imbursed the expense of fitting up their premises as telegraph offices, and the expense incurred in paying for instruction, together with damages for the loss of the contract, which was said to be worth about \$180 per annum.

While I have no doubt the plaintiffs incurred the expense of fitting up offices and procuring instruction in telegraphy, upon a well-founded faith that they would continue to enjoy the contract for a period of time, I am of opinion that these particulars did not enter into the contract itself, but were only incidents in it, or acts preparatory to it. That there is in law no

implied undertaking on the part of the government to pay for these things upon the termination of the agreement or otherwise, and that, therefore, they are not a subject of consideration for the court in passing judgment in this case.

The questions for the court are, whether in a contract of this kind a reasonable notice of its intended termination is implied, and, if so, what would be a reasonable notice

I am of opinion that, under the circumstances, such a notice is implied, and that however sound the policy and reason of the government may have been in making the change, such notice should have been given, and that it should, in view of the use of the premises connected with the service, have been at least a six months' notice, and consequently that the plaintiffs are entitled to judgment in a sum which I assess at \$80 with costs.

IN RE MCGIRR, AN INFANT.

1891, July. HON. MR. JUSTICE LITTLE.

Infant—Guardian, removal of—Welfare of infant.

On an application for a *habeas corpus* directed to the *quasi* guardian of an infant to deliver up same to the father; it appeared that the infant was born in 1884. The mother of the child, who had died shortly after its birth, had, in a letter addressed to the father, confided the child to the care of her aunt, the present *quasi* guardian. The father appeared to have assented to this, and the child continued with the guardian and was maintained and educated by her. The child was removed from Scotland, where the father resided, to Newfoundland, where the guardian had established her permanent home. It was admitted the father had contributed somewhat to the maintenance of the infant. The treatment of the child by the guardian was not questioned—she was a person of means, and spared no expense on the education and care of the infant. The father was a master mariner, and was a great deal of his time at sea. He was about to marry again. There was danger that the health of the child might be injured by removal.

Held—Under all the circumstances, that it was not in the interest or the welfare, health or happiness of the child that it be taken from its present custody, and, so as to bring it under the control of the court, the present custodian be appointed guardian; rule discharged.

APPLICATION was made in this matter on the affidavit of John McGirr, for a writ of *habeas corpus* directed to Mary Skinner, of St. John's, widow, for the delivery over of the said infant, alleged to be in her charge and custody, to the said

John McGirr, as the nominee and attorney duly authorized for that purpose of David McGirr, of Scotland, the father of said child. On the return of the writ Hon. Mr. Morris appeared as counsel for Mrs. Skinner, who attended with the infant at the hearing of the argument, and Sir J. S. Winter, Q.C., represented the applicant.

From the statements set out in the affidavit of the parties, it appeared that in the month of October, 1882, at Greenock, in Scotland, the said David McGirr was married to one Jane Coleman, formerly of St. John's; that on the 22nd July, 1884, the child in question was born, and was the only issue of the said marriage; that the mother, Jane Coleman, died a day or two after the birth of this infant. The father, David McGirr, at the time of the birth of said child and the death of his wife, was on a voyage to the West Indies, and did not return to Scotland for some time thereafter.

It further appeared that the deceased, Mrs. McGirr, was the niece of Mrs. Skinner's then husband, the late Capt. Skinner, and had for many years, both in St. John's and in Scotland, resided with them, and was married and died in their house at Greenock. In short, she was, as stated by Mrs. Skinner, regarded and treated by them as their adopted child; they had no children of their own. The mother, in her mortal illness, confided the infant to the care and charge of Mrs. Skinner, and in writing stated formally her desire in this regard to her husband; that on the return of the said David McGirr from his then voyage, he fully assented to and approved of this desire, and from then the child has remained in the care and charge of Mrs. Skinner.

It also appears that on Mrs. Skinner's change of abode from Greenock to St. John's she brought the infant with her, with the knowledge, assent and approval of the father, who has contributed something to the support of the child. The conduct of Mrs. Skinner, and her attention to and treatment of the child is not at all questioned. She appears to be a person of considerable means, and in no way sparing of expense in regard to the education and care of the infant.

It appears, as referred to by counsel in argument, that the father of this infant is now about marrying again, and in view of having a new home for his child is desirous of having her sent to Scotland. To more conveniently and properly affect this object he deputed his step-brother, John McGirr, by letter of attorney, to act in his behalf in this matter. The latter,

accompanied by his sister, attended in court, and through counsel expressed their willingness to take charge of child in pursuance of the desire of the father.

This proposal or demand is stated to be the first intimation conveyed to Mrs. Skinner of any such wish or intention on the part of David McGirr, whose letters to her express in most friendly terms his entire satisfaction with the relations existing in behalf of the infant. Statements are made in the papers filed to the effect that the father of the child is now away on one of his long voyages, and may not return for a lengthened period of time; that his means are uncertain and these of the present parties acting for him are most meagre, and are derived from their own manual labour.

Lastly, there is on file a statement, under oath, from Dr. Rendell, the medical attendant of the infant, from which it would appear that her present condition is such as to require much care and attention.

Now, under these circumstances, we have to determine whether this child shall be allowed to remain in the custody in which it now is, or shall be handed over to the nominees of the father.

Although cases of this nature have presented varied peculiarities and disclosed unfriendly and acrimonious feelings in the course of their hearing before the court, still in this instance, it is worthy of remark, there has been not only an absence of any such contentious spirit, but apparently a concurrent desire actuating the parties to act entirely in the interests of the child.

This desire will be found in perfect harmony with the spirit of the law and the principle recognized by authorities in adjudications determining the rights of parents and guardians in all such cases.

The law on the subject is perfectly plain, and amongst other rulings it lays down that a parent cannot by agreement give up his natural right to the control of his child, nor absolve himself from his duties and rights in regard to his children. The parental authority cannot be interfered with by the court but under very exceptional circumstances.

"That although a party takes a child at its parent's request, and by agreement with him, and expends care and money upon it, nevertheless, when the parent choses to ask for the child he has no course but to acquiesce, unless he can show some good reason to the contrary"—*Reg. vs. Bernardo*, 34 W. R. Further

reference to authority on this primary principle of parental right would be superfluous, but it must be borne in mind that in giving effect to it courts of law keep well in view the main object in such actions, and jealously guard that to which other matters are subordinate, namely, the welfare of the child.

"The first and paramount duty of the court unquestionably is the well-being of the infant."—*per Lord Justice Turner in re Andrews vs. Salt, L. R., 8 Ch. D.* The same principle is laid down in *Austin vs. Austin, 34 Bev., 263*, and the power of the court to interfere and deprive the father of the custody of his child in a proper case is undoubted, "but such an interference will not be made arbitrarily, but only when the circumstances proved satisfy the court that its duty to the infant requires it to act contrary to the wishes of the parent."

In *Lyons vs. Blenkin, Jac. 245*, it is held that a father himself may lose the right to the custody of his child by allowing it to be brought up by other persons, if it becomes the manifest interest of the child not to be removed from the custody in which it has been placed.

This being the current of legal authority on the subject, it is obviously unnecessary to particularly mark its application to the data presented in this matter. Still, in the light of such opinions and rulings, it may be necessary, in further support of the decision arrived at, to note the evidentiary facts, particularly that from the time of the marriage up to the present, the father of this child had no fixed residence or home of his own, and the wife continued up to her death to have lived with Mrs. Skinner. From the letters addressed by the father during his absence abroad to Mrs. Skinner, it is clear he had the utmost confidence in her, and willingly confirmed the last desires of his wife, viz.,—that the child should be left in her care and charge. No word of disapproval or complaint of any kind is made, not even up to the present, as to the position and treatment of the infant, and every care and consideration appear to have been bestowed in its training and education. It is not questioned that the means and ability of Mrs. Skinner are ample to enable her to provide for the child's comfort and welfare, and it is only natural to suppose that from such an association between the custodian and the infant feelings of affection exist akin to those existing between a mother and child. It is then not surprising that the bare intimation of the present proposed separation should have affected the child in the manner referred to in the evidence and by counsel.

However desirous one may be to sustain parental authority and uphold the natural and legal right of the father, still I am reminded of the paramount duty imposed in regard to the welfare, health, and happiness of the child. I think, therefore, that, under present circumstances, it would be inexpedient to order that this infant be now taken out of the care and control of Mrs. Skinner and placed in the hands of the father's nominee. As it has been suggested that a guardian to the person of the infant be appointed, so as to bring it under the control of the court, an order will go to that effect for the appointment of Mrs. Skinner, and security must be given by her for the discharge of her duties as such guardian.

His lordship the chief justice was present on the first day of the hearing of the argument, and desired me to state that, in his judgment, the application should not at present be acceded to.

Sir J. S. Winter, Q. C., for applicants.

Hon. Mr. Morris, (Acting Attorney General), for the custodian.

EVANS v. BELL.

1891, *August*. HON. MR. JUSTICE PINSENT, D.C.L.

Trespass—Damage to fence and trees—Construction—Highway.

Where the defendant, a road commissioner, cut and damaged the roots of trees of a proprietor abutting on the public road whilst in the course of levelling the same and undermined his fence. In an action for damages,

Held—That as the trees were planted since the road was constructed, there was no liability, as the owner should have guarded against their roots intruding on the highway. As regards the undermining of the fence, the commissioner was liable for the damage.

THIS was an action of trespass, in which the plaintiff, a resident merchant and J. P. at Grand Bank, sued the defendant, (chairman of the road board), for undermining the plaintiff's garden fence, and trees opposite his dwelling-house, in the course of levelling and widening the high road. The judge, in the course of the trial, took a view of the place, and finally held that the claim for injury to the fence had been clearly made out, and that the plaintiff was entitled to damages under that head; but that he was not entitled to be compensated for

injury to trees from their roots having been removed from the soil of the road, because it appeared the trees had been planted since the public road had been laid out many years ago, and the plaintiff, when putting the trees so near the edge of his boundary, must have expected that in the course of nature their roots would have intruded on the public way. Judgment for plaintiff for \$30.

Mr. Carty for plaintiff.

Mr. Knight for defendant.

PALMITER v. POWER.

1891, *August*. HON. MR. JUSTICE LITTLE.

Arbitration—Arbitrator—Interest in award.

Under the municipal law a compulsory reference to arbitration was prescribed for ascertaining the damage occasioned to properties by the taking of land for street widening purposes. The statute gave the Municipality the appointment of two of the arbitrators, and the owner of the land a third, and the decision of any two was final and binding. The Municipality appointed its chairman and ex-chairman as their arbitrators, to which the owner of the land took exception. The Municipality declined to substitute others, and were about to proceed with the reference; whereupon the owner of the land applied for an injunction to restrain the parties from so acting on the grounds of interest, etc. Upon the hearing,

Held—An appointee to such a position as an arbitrator must be one standing indifferent between the parties. Any interest which may be calculated to bias the mind disqualifies. An expression by one arbitrator which indicates bias is sufficient to disqualify and have award set aside. Injunction granted.

THE matters in contention in these proceedings have arisen by reason of the proposed appropriation, for municipal purposes, of certain land of the plaintiff, situate on Carter's Hill, in St. John's.

For the purpose of ascertaining and determining the value of the land to be taken, or the damage, if any, that may thereby be occasioned the plaintiff, a compulsory reference to arbitration as prescribed by statute became necessary.

In accordance with the terms of the statute three arbitrators should be appointed for the adjustment of this valuation; two of these must be appointed on behalf of the council, and one to be chosen by the plaintiff.

It appears that plaintiff in due course named an arbitrator, and, after an application had been made to the court for a mandamus, the council named its two arbitrators, these were the chairman, Mr. Power. and Mr. Goodfellow. To this nomination exception was taken by the plaintiff, but the council declined substituting others and insisted on proceeding with the reference; thereupon the plaintiff had recourse to these proceedings on an originating summons for an injunction to restrain these gentlemen and each of them from acting as such arbitrators.

The following extract from the plaintiff's own affidavit filed in support of the motion, is sufficiently explicit to show the grounds and reasons relied on by him in excepting to these nominees :—

"I object to the appointment of both and each of the gentlemen to act as such arbitrators, and consider their appointment unjust and unfair towards me for the following and other reasons : (1) The said Michael Power was during all * * * these negotiations, and still is, chairman of the said Municipal Council, and has, I verily believe, already formed an opinion adverse to my claim for compensation. * * * (2) James Goodfellow was, for some time pending these negotiations and correspondence, also a member and the then chairman of said Council, and to him * * * my claim was referred, * * * by the Council, and he took a very active part therein. * * * I verily believe he has already formed a strong opinion adverse to my claim for compensation, * * * my belief being further formed upon the statement made by him to me whilst he was * * * in charge of the negotiations, to the effect that he did not consider me entitled to any compensation other than the \$20 which had been paid me, meaning a sum I received for the removal of part of a house which I had begun to erect on said land."

The arguments of counsel at the hearing of the summons were necessarily brief and confined principally to some references to authorities in support of the principal underlying the objections taken on ground of interest or favour in arbitrators in cases of submission or references generally. The sworn statements of the plaintiff were not met by any counter affidavit on the part of the defendant

I have, therefore, to consider the respective positions of the proposed arbitrators, the data so far given, and the principles of law applicable under such circumstances, in order to determine whether the objections are sufficiently valid and of such a character as to entitle plaintiff to the relief asked for in the originating summons.

First, then, as to the status of Mr. Power and his relationship to the defendant council, we find that in pursuance of the powers granted by the legislature under the 40th section of

the Municipal Act of 1888, the council duly elected him as its chairman; that by the 42nd and 43rd sections all contracts or agreements of or with the council must be made in the name of the chairman; and all actions taken by or against the council must be taken in his name as chairman, &c., &c. And out of the funds at its disposal there shall be paid him the sum of \$600 per annum. It may be summarily stated that this body or council was created by special Act of the legislature to improve, contract, control and regulate public works, &c., for the improvement of the town, and is also invested with powers formally possessed and exercised by other institutions in their relation to the town, such as the Board of Works, the directors of the St. John's Water Company, &c.; and has conferred on it certain powers of assessment subject to legislative approval.

The council is composed of seven members, two appointees of the Governor in Council and five selected by the rate-payers of St. John's. There is no substantive or separate section in the statute providing for the appointment of arbitrators, but, as already stated, the practice prescribed by the 13th sec., cap. 80, of the Consolidated Statutes, relating to the re-building of St. John's, is made applicable and must govern in cases such as the present. It was stated in argument, and probably correctly so, that in similar cases under the operations of the old Act the arbitrators appointed by the government were, generally, the Surveyor General for the time being, and one other official, and that the practice must have been found satisfactory to the public as we have no instance on record in which exception would appear to have been taken to the appointments. The argument as advanced in support of the claim to appoint any party, officials or others, as arbitrators under the Act, establishes nothing beyond what may have been formerly found officially convenient as a mode of practice. If parties accepted such nominations without demur, their conduct can have no binding effect on others in the absence of anything obligatory or directory in that regard in the statute. It might be observed, in passing, that the practice prescribed for the appointment of arbitrators under the St. John's re-building Acts is somewhat singular and not in accord with the common rule observed in making such appointments, nor with provisions of statutes of like character, such as the Harbor Grace and Carbonar Re-building Acts, by which the more equitable practice is prescribed of each party, under such circumstances as are here in question, appointing one arbitrator and these selecting an umpire.

In England, in analogous cases arising under the operation of the Land Clauses Consolidation Act, arbitration is not compulsory, but if resorted to, to ascertain the value of appropriated lands, each party names his arbitrator and these select their umpire, or the valuation may be left to two justices of the peace or submitted to a jury for assessment. In the face of the express and unambiguous language of the section governing the council in cases of this nature such reference to practice may be of interest, but cannot alter the prescribed course of procedure here. With the alleged unfairness or inequality of such a representation in a tribunal so composed I have no other concern than to see that it is constituted and the nomination to it made, in conformity with the letter and spirit of the law.

Over this statutorily authorized tribunal two parties have thus been nominated to preside, and, acting within his rights, the plaintiff has in proper and due time made his objections to these nominees or referees, and taken exception to them severally on the grounds already given. Having regard, therefore, to the importance of the question thus raised and the effect of its determination, some general reference to fixed and authoritative rulings of courts and judicial dicta on the character, formation and procedure of such bodies is called for. In the first place, it is beyond question that the appointees to such a quasi judicial position must be persons who stand "*indifferent* between the parties." An arbitrator has, in fact, a similar position to a judge, who cannot deliver a valid judgment on the subject matter of which he may have an interest.—2 *B. & Be.*, 16; or, in other words, "no man can be at once judge and suitor."

The law is wisely jealous on this head, and the slightest real interest in the issue of a suit incapacitates anyone from acting as judge in it, although it may be certain that in fact the interest from its real or proportionate insignificance *cannot create any bias* in his mind,—per Lord Campbell, C. J., in *re exparte Medwin*, 1 *E. & B.* And in *Redmond on Arbitrations*, the same established rule is laid down as of fundamental importance and must be observed on such appointments, viz., "that an arbitrator is in a quasi judicial position, and in ordinary cases it is a first ground of objection that he is not indifferent between the parties." The same doctrine is repeated wherever the point called for attention in the pronouncements of courts of law on the subject, as in the case of *Kemp vs. Roe*, 1 *Jur.*, p. 4, *vice*

Ch. Bruce observed, where questions of partiality or impartiality arose it was not necessary to show a cause of corruption. A perfectly even and unbiased mind was necessarily of the essence of every judicial proceeding, and if any circumstances calculated to produce a bias appeared, it was sufficient for the interference of the court. In further illustration of the practical application of the principle thus observed on, reference may be had to the case of *Reg vs. Meyer and others, Justices of Middleser, L. R. Q. B. D. 1*; judgment was delivered on a rule for a *certiorari* for the removal into the Queen's Bench of certain convictions had by four justices of the peace. One of the grounds on which the application rested was that one of the justices was interested in the prosecution, being "a chairman of the Enfield Local Board of Health," one of the boards at whose instance the proceedings were instituted. It was shown on affidavit that although the chairman sat as justice at the hearing of the case, still he took no part in it. *Blackburn, J.*, stated, *inter alia*, "the disqualification is not on the ground of pecuniary interest, was Meyer really substantially interested in the proceedings so as to be likely to have a real bias in the matter, although he took no part in the conviction, clearly he ought not to have been on the bench, and the rule must be made absolute." We find the principle also strongly emphasized in the proceedings, and judgment in the case of *Elliott and the South Devon R. Company*, as reported in *2 Deg. & S.*, where the surveyor of a company had in that character treated with a land owner and offered a price for land required by the company. He was subsequently named as arbitrator upon an arbitration in relation to the valuation of the land, under the Land Cls. Con. Acts. It was held he ought not to be selected, but the owner of the land knowing the fact, and though protesting against the propriety of the appointment, proceeding with the arbitration was properly held to have waived the objection.

In relation to the nature and character of the interest which may thus disqualify one from being appointed as an abitrator, the subject is comprehensively stated in the following quotation from *Russell on Arbitrators*: "It is not only a pecuniary interest which disqualifies, but any interest which may be calculated to bias the mind. * * * If there is some circumstance in the situation of the arbitrator which tends to bias his mind, he is not a proper person to be a judge between the parties." This ruling is also laid down in the case of *Dimes vs. The Grand Canal Company*, 3 H. L., C 759.

Such then are a few of the references bearing on this subject selected from a number given in the reports and text books.

No great difficulty meets one in applying these principles to the questions raised in this matter, and in doing so, attention must, for the present, be confined to the consideration of the official position of the nominee, Mr. Power, aside from any importance that may attach to the averment that "he, Mr. Power, has already formed an opinion adverse to his claim." If this charge "of prejudging" in its present form stood alone, I would be inclined to regard it as too general and not sufficiently specific as a ground of disqualification. Viewing the chairman as such nominee from the legal stand point, we must recognize him as the presiding officer of the council, the party defendant in proceedings of this nature, the head and front in all actions at law by or against the council. For his attention and active services in the interest of the council and municipal affairs he is entitled to a fixed annual salary, payable out of the funds at the disposal of the council. It may be accepted as a consequence following on these facts and the zealous discharge of his functions, that the chairman conserves, as far as he can, the general interests of the rate-payers, and will endeavour to exercise a spirit of economy in the administration of the council's affairs, and necessarily in expenditures to meet claims arising out of such cases as the present. This being so, does it not appear rather unreasonable and anomalous that the council, in the exercise of its compulsory powers of arbitration, should, in addition to its other advantages, insist on the appointment as an arbitrator of one so thoroughly identified with it? And although he may not have expressed any opinion or done anything from which bias or prejudice in favour of his constituents could be inferred, still, under the circumstances, there must be naturally in the minds of parties interested a sense of insecurity and uncertainty in the issue of such an arbitrament, which would not exist if the referee were one known to stand perfectly indifferent between the parties.

In my judgment, then, the chairman of this council should not be nominated to fill the position of arbitrator in this matter, and I must hold, under the circumstances, that the objections made to such an appointment are well taken.

As regards the exception taken to the other appointment, it rests on different grounds, and does not call for any lengthened consideration. The plaintiff's sworn statement that Mr. Goodfellow, whilst chairman of the council, had been connected

with the appropriation of this land to improve a main line of street, and had expressed the opinion against the claim in the decided and specific manner alleged in the affidavit of plaintiff, would appear, in itself, sufficient to support the objection taken to his proposed appointment as arbitrator. I find that where an arbitration had been proceeded with and an award made, it was set aside by a court of equity because of a charge against an arbitrator of bias or partiality, ascertained or alleged to have existed because of such an expression of opinion. Further, in *Bacon's Abrigt.*, p. 319, it is laid down, "if one of the arbitrators use any expression towards either party which discovers bias or prejudice in his mind, a court will set aside the award, though there be nothing to impeach the conduct of the other arbitrator."

Mr. Goodfellow may have been perfectly right in the conclusion arrived at on foot of the claim made by the plaintiff, but in view of its going to arbitration, his expression of opinion was decidedly inopportune, and so far compromising as to render him obviously ineligible to hold the position of arbitrator. The sworn statement of the plaintiff setting out the expression of opinion and the language used remains uncontradicted, therefore calls for no further observation.

Under the facts and circumstances disclosed in these proceedings, and the law applicable to these, I find I must decide in favour of the plaintiff, and that he is entitled to the order sought for in his originating summons.

Mr. Kent, Q. C., for plaintiff.

The Acting Attorney General (Hon. Mr. Morris) for defendant.

1891, November. HON. MR JUSTICE PINSENT, D.C.L.

Infant — Guardian, removal of — Welfare of infant — Religious education.

On an application for a *habeas corpus* directed to the mother of the child, a widow, for the delivery of the same to the paternal grandfather, it appeared that the infant was about nine years of age, that previous to the death of the father, and during his absence, the child had been sent away by the mother to a relative of hers, and that, on the father's return, he had expressed his determination to regain possession of the child, and, with regard to all his children, that they should be brought up members of the Church of England, whereas now they are being educated as Roman Catholics.

Held—That the father has the first and the mother the second title to the guardianship of their children. The father being dead the rights of the surviving mother are absolute. As regards the question of religious education, the court has no preferences, and looks only to the welfare of the child, and holds that the Protestant and Roman Catholic faith are equally beneficial. Rule discharged.

THE application in this case is for a writ of *habeas corpus* to be directed to Catherine Congdon, widow of Richard Congdon, for the delivery into the custody of the paternal grandfather of a child born to Catherine and Richard, named John, stated to be between eight and nine years of age.

The motion is founded upon an affidavit of the grandfather (Samuel Congdon), setting out the death of his son (Richard) in May last, leaving him surviving six young children; that at the time of the making of that affidavit two of those children (Samuel and Rachel), aged respectively, ten and seven years, were residing with him, and had been maintained by him at the widow's request since the death of their father, who was in very poor circumstances; that the child John (who is the special subject of this application) was with a relative of his mother's—a Mr. Lee, of St. Mary's; and an infant child with a brother of the mother; and the two remaining children with the mother herself.

The affidavit further sets out that John was given to Lee during the absence of his father at last spring's seal fishery, and that after his return from that voyage he (Richard) declared that the boy (John) had been sent to Lee without his knowledge or consent, and that he expressed his determination to regain possession of the child; and that, with regard all his children, he expressed his desire and determination that they should be brought up as members of the Church of England, whereas they were now being educated as Roman Catholics.

It appears that Richard Congdon was a member of the Church of England, while his wife was a member of the Church of Rome; that they were married by a clergyman of the first-named, and it is said that the woman at that time signified her intention of becoming a member of the Church of England, and for a short time after marriage sometimes attended the services of that church.

The children of this union appear to have been baptized both as catholics and protestants; but the son John particularly is said to have attended both church and school in connection with the Church of England—the school up to the time of his being placed in the care of Mr. Lee; the church during a prior time when his parents and his grandfather (Samuel Congdon) lived under the same roof—and some of the other children at times had attended church with their grandfather (Congdon).

The testimony of Samuel Congdon is supported by the examinations of a daughter and son-in-law, and one or two other persons.

On the other hand, the mother of the infants swears that her children (Rachel and Samuel) were placed with their grandfather after their father's decease only until she could make arrangements for settling down with her family in another house; that the boy (John) had been taken by Lee at the desire and consent of both his father and mother, expressed and understood before his father's going to the seal-fishery; and that Lee was willing to adopt the child and bring him up in comfortable circumstances.

Catherine Congdon further states that, after Richard's return from the seal-fishery he expressed his approval of the boy's being sent to Lee; and it seems that no step was taken by him to get the boy back, nor any request made by him to Lee for his return during the few remaining weeks of Richard's life—unhappily terminated by himself through drinking some poisonous fluid in mistake for spirits. I may observe here that Catherine Congdon denies that she ever promised to become a member of the Church of England, and states that she has "been a regular communicant of the Catholic Church"; and that after her husband's return from last spring's seal-fishery their eldest daughter died in the Roman Catholic faith, and received the last Sacraments of that Church with the knowledge and approval of her father; and also, that the christening of the children in her own church, as well as in that of her

husband, was known to him and not objected to by him; that her husband himself seldom attended any place of worship.

In the deposition of Edward Lee, of St. Mary's, merchant, he swears that he had known Richard Congdon intimately for many years, and that they were frequent visitors at each other's house; that about two years ago he (Richard) spoke to him (Lee) about taking his son John, as he was in a better way of doing for him, but that at this time he (Lee) did not consent to take him, as he had already adopted one or two other children; that afterwards, after repeated requests from the father, he consented to take his son John in the spring of this year, the father saying he was to do as he liked with him, and to bring him up in his (Lee's) own religion; that he (Lee) received the boy on those terms.

Edward Fagan, who was frequently in the company of Congdon and Lee, swears to being present at more than one conversation between them, embodying and confirming the version given by Lee of the agreement about the boy John, and of the spring of this year being the time named for his being taken by Lee.

James Fagan deposes that at the request of Richard Congdon he stood as godfather to one of his children, when the child was christened a Roman Catholic; and that he (Richard) had often told this deponent that his wife could bring them up as she liked.

The mother-in-law of the deceased deposes to promises of Richard Congdon that his children should be brought up as Roman Catholics; of his knowledge of their being christened as such; of his "taking part in the Rosary" with her and her family, and so forth. Several others depose to Richard's sending for the priest for his dying daughter, and of himself sprinkling the child with holy water.

Such is substantially the evidence in this dispute, and the question remains what law is the court to apply to the case?

I will consider, in the first place, the question of the right of custody, which is truly the substantial question in a proceeding of this kind upon a rule for a writ *habeas corpus* when the infant is not a ward of court.

This is a case of guardianship of the person, unconnected with any right of property to be administered for the benefit of the infant.

It is sought in this proceeding to take out of the custody, control and disposition of the mother her infant children.

The law holds that the ancestors of children are their guardians by *nature*, and that the father has the first title and the mother the second. There is also the guardianship for *nurture*, and none can have this except the father or mother, and this latter extends in the case of boys to the age of fourteen.

The right of the father is considered so paramount that nothing can deprive him of it nor afford an answer to his suit for delivery of the person of his children, unless it appeared that in his hands they would be subject to cruelty or gross corruption, or that he had absolutely abdicated his rights to such an extent that any return to their exercise would be to the injury of the infant. Thus we have held recently in the case of the *Infant McGirr*, that the father was entitled to resume the control of a child whom he was not shown to have transferred to the management of others for more than temporary purposes.

The husband being dead the rights of the surviving mother are equally sacred and no less absolute. This position, it appears to me, is not open to controversy and requires no citation of specific authorities.

But it is said there is a question in this case of the religious education of the children, and they ought to be brought up in the religion of their deceased father, and the court ought, therefore, to deprive the mother, the legal guardian by nature and for nurture, in favour of the grandfather.

No authority has been cited to support such a position as this in a proceeding of the kind with which we are now concerned. But supposing that either in exercising the delegated authority of the crown as *parens patriæ*, or as a condition attached to permitting to the mother to retain the custody of her children, the court were asked to direct her, in peril of contempt, to bring up her children in the religion of the father, it may be well to inquire whether, under the circumstances of the case, the court would or ought to go the length of imposing such conditions upon the mother.

I would premise that upon points of religious doctrine a judge, acting judicially, ought not to have any preferences, and if he have any prejudices he should overcome and disregard them.

In the well-known case of *Austin vs. Austin*, cited by Mr. Morris at the bar, (the converse of this one upon the point of religion), the master of the rolls, Sir J. Romilly, expressed himself in language which so entirely coincides with my own opinion of the principles that should govern the exercise of

judicial discretion with regard to the custody of children in a case of this complexion, that I take the following extract from the judgment,—*24 Bear., p. 263*:

“In these cases the court only considers what is most for the benefit of the infant. In the matter of religion the court holds that the Roman Catholic faith and the Protestant faith are, to this extent, equally beneficial to the child,—that it considers the hope of eternal salvation does not depend upon the circumstance whether she entertains one faith or the other, but upon the manner in which she fulfils her duties upon earth. But the court, although it holds an equal hand between them, always gives a preponderance to the wishes and desires of the father, and, in the absence of other circumstances materially to the benefit of the child, it directs the child to be educated in the religion of the father. But all this is subordinate to the first and primary object, which is the welfare of the child, because, as I have already stated, the future salvation of the child does not, in the judgment of the court, depend upon the faith which it entertains being either Roman Catholic or Protestant. No thing, and no person, and no combination of them can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother that no extent of kindness on the part of any other person can supply that place. It is the notorious observation of mankind that the loss of a mother is irreparable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed to induce this court to take a child from the guardianship and custody of her mother. It is, in point of fact, only done where it is essential to the welfare of the child. There are cases of unnatural mothers and of immoral mothers where the court is obliged to take away a child from the mother, finding that a bad mother is really worse than no mother at all; but in these cases it acts solely for the benefit of the child.

“Now, upon reading through the papers in the present case, there is not a suggestion of unfitness or of anything against the character of the mother. The case is put solely on the question of what faith the child shall be educated in, and what I have to consider is whether the importance of educating the child in the Roman Catholic faith, because it was the religion of her father, is sufficiently urgent to deprive the child of the care of her mother. I am of opinion that it is not, and that it is impossible, for the benefit of this child and for the sake of educating her as a Roman Catholic, that I can properly take her from her mother. I should hesitate to do that in any case; but in this case I think the father of the child himself must have entertained considerable doubts upon the subject.”

Although in that case, which related to a ward of court, an order was subsequently made by the Lord Chancellor that while the mother was to retain the custody of the infant, yet, when the child came to be capable of religious instruction, he was to be educated in the religion of his father, the facts presented nothing like so strong a case against the general principle that a child should be educated in the religion of his father as the facts in the present proceedings do.

The weight of evidence here seems to me to indicate not only great indifference on the part of the father, but to a large extent it reveals acquiescence on his part in the desires, preferences and proceedings of his wife; although it is true that when under the influence and in the society of his father, to whom he was indebted for much aid, he professed and, perhaps, was even inclined to act differently.

With regard to the infant John, with whose case I am now called upon to deal specifically, the preponderance of evidence in my judgment is with the position taken by the mother; that the father voluntarily abdicated his rights, and that she now confides this son to Lee in terms of the express understanding and agreement with the deceased father, to which reference has been already made; and that it is, in the meantime at least, for the benefit and material advantage of the child that he should remain as he is.

It is clear that a father may, by his own conduct, even in his own lifetime, lose the right to have his child educated in his own religion, *a fortiori* after his death.—*In re Scanlan Infants*, 40 Ch., Div. 208; and see *Hill vs. Hill*, 31 L. J. Ch., p. 505.

I cannot discover any sufficient ground-work in this case for the interference of the court with the mother's control and discretion, and I think, in the interests of the infant, that any such interference would be deplorable.

I deliver this judgment as an act of court before a single judge (and not in chambers), that in the event of any substantial doubt being entertained of its accuracy, there may be a re-hearing before the full court.

In the point of view that I believe the grandfather has, in moving in this case, acted with every honest and commendable intention, I would order the discharge of the rule without costs.

Sir J. S. Winter, Q. C., and *Mr Morison* for the applicant.

The Hon. Mr. Morris for the mother of the infant.

1891, *April*. CARTER, C. J.; PINSENT, J.

Shipping—Extraordinary expenditure—Power of master of fishing vessel to bind outfitter.

Where a fishing vessel fitted out with all needful supplies put into a port before her return home, not in distress, the port being in communication with the owner, and the master made purchases from plaintiff. In an action against the owner to recover the amount of the goods delivered,

Held—Master has no power to bind the credit of the ship-owner, except where absolutely required and when he cannot communicate with his owners.

THIS action is brought to recover \$42 for the price of goods, consisting of flour, tobacco, ice and some cash, alleged to have been furnished and paid at St. Lawrence, in the district of Burin, in this colony, in May, 1889, to ——— Goodwin, master of the vessel *Snow Bird*, then prosecuting a banking voyage, of which the defendant was the owner. There were no special circumstances or exigency which shewed that these articles were required for the use of the vessel in the prosecution of the voyage and they were apparently given on the mere application of the master, without enquiry by the plaintiff, he contentedly debiting them to the defendant as owner.

From the evidence of the defendant, taken out of court under a judge's order, he swears that the vessel was amply supplied with all things necessary for the voyage, and had more than a sufficiency of provisions, also cash given to the master for the purchase of bait and ice; a detailed account of all which is appended to the written evidence; also, that he did not know the plaintiff, and never had any dealings with him; that he never authorized the master or anyone else to obtain such goods, and knew nothing of their being had until plaintiff made his claim, nor did the master acquaint him that he required any goods. Early in June of that year the master deserted the vessel, &c.

In this case there was no special authority conferred on the master to obtain additional supplies on the voyage, nor was any authority proved in the trade from usage, although sometimes, as incident to his appointment, when he cannot communicate with his owners or agents, the master may pledge their credit for all such repairs, for the supply of all such provisions as are reasonably necessary for the due prosecution of the voyage in which the ship is engaged.—*Beldon vs. Campbell*, 6 Ex. 890; *Webster vs. Seekamp*, 4 B. & Ald., 352; *Arthur vs. Barton*, 6 M. & W., 138, &c.; *Kay on Shipping*, 479.

In order to constitute a valid demand against the defendant it was incumbent on the plaintiff to show the apparent or presumed necessity for furnishing these articles, and that they were reasonably fit and proper for the occasion. He has not tendered any evidence in this respect, while we have the positive testimony of the defendant, not attempted to be contradicted, that the ship was amply supplied with all necessary things for the voyage.

The proper mode of ascertaining whether supplies or repairs were necessary, is to ask whether a prudent owner himself would have ordered them under the circumstances if he had been present — *Webster vs. Seekamp, supra*.

This would be a question for a jury if the case had been tried before one; and as we are both judges and jury I do not imagine we can have the least hesitation, from the evidence, in answering that question in the negative. And clearly the master's position in this case was not such as to constitute him the authorized agent of the defendant so as to pledge his credit. This is a question of fact which in cases like this the court also leaves to a jury to answer. — *Arthur vs. Barton, supra*

The plaintiff does not appear to have troubled himself in the least, even to make enquiry as to the actual necessity for these so-called supplies, and there was, I think, sufficient in the article of tobacco alone to have aroused his suspicion. But besides all this, even if there had been a necessity shewn for such goods and cash, when the ship was within telegraphic distance of the defendant, he should have been communicated with before his credit could be pledged, unless (what is not pretended to have existed in this case) the necessity was so great that the master could not wait to consult the defendant without considerable prejudice to his interests. — *Kay, 487, and cases therein cited.*

It was asserted in argument that if the plaintiff failed to recover ship-owners would be seriously prejudiced on such a voyage, as, in case of necessity, no person would make advances; but I am inclined to think that if he did recover, under the circumstances disclosed in this case, it would have a much more damaging effect on the interests of owners, who would thus be exposed to the recklessness, to say the least, of such masters as the commander of the *Snow Bird*, and moreover, would be in contravention of the recognized principles of law in like cases. If the owner should intend, in the event of emergency happening, to have his credit pledged on such a

voyage, he can easily empower the master to do so before departure on the voyage.

Although the amount sought for is comparatively small, yet the principle involved in this case is of considerable importance to the trade to be determined by this court, and I may mention that in the case of *Arthur vs. Barton, supra.*, the sum in dispute in a similar question was less than £5, yet of so great importance was the matter deemed to be to shipping interests, that it was brought before and disposed of by the Court of Exchequer in England, the Chief Baron Lord Abinger giving the judgment of the court, and eminent counsel being retained on each side.

I am, therefore, of opinion the defendant is entitled to the judgment of the court in his favor.

HON. MR. JUSTICE PINSENT:

This is an action involving only a small amount, but it is somewhat important in principle, and the court has been asked to give publicity to its judgment, by way of removing the impression said to be prevalent that masters of banking vessels in this trade possess unlimited authority to pledge the credit of their ship-owners or out-fitters for general supplies.

Masters of these vessels possess no such authority. They are strictly limited to cases of absolute necessity, and they can only then assume an agency, when the power of communication with the owner is not correspondent with the urgent necessity of the case.

Here a vessel was fitted out at Carbonear with, as is alleged, sufficient supplies of all kinds for her then voyage. She put into St. Lawrence before her return home, not in distress, but within the means of speedy communication with the owner, and there the master made purchases of tobacco and flour from the plaintiff, and procured from him the payment of an order for ice.

It might open the door to boundless imposition, fraud and extravagance, if the courts were to recognize such an authority as that which, it is said, is supposed to exist, of these ship-masters possessing indefinite and unlimited right to pledge the credit of their employers.

As to the items of bait and ice the rule would not, in my opinion, be so strictly restrained as for other outlays.

If the necessities of the venture absolutely required, in the interests of employers and employed, that these articles should be obtained at the nearest convenient point for obtaining them, and if they were sold and delivered on board in reasonable quantities and under circumstances free from suspicion, the master not being in funds to pay for them, I think the credit of the owner might be pledged.

Even then it would be much better and safer, in the interests of all parties, that the master should be provided with and produce a written authority.

In the present action there is a charge for ice \$12 50, which, there appears to be no reason to doubt, was actually and reasonably supplied.

All the items charged will, with this exception, be disallowed, and there would, in this point of view, be judgment accordingly for the plaintiff for \$12.50 without costs.

Hon. E. P. Morris for plaintiff.

Mr. Emerson, Q. C., for defendant.

IN RE THOMAS O'NEIL.

1892, *January*. HON. SIR F. B. T. CARTER, C. J.

License to sell intoxicating liquors on premises—License Act, 1875—Open after prohibited hours—Appeal.

The appellant, being licensed to sell by retail intoxicating liquors on his premises, was convicted of a breach of a section of the "License Act, 1875," regulating the closing of houses licensed for the sale of intoxicating liquors. The conviction was appealed from on the grounds: (1) The premises were not open; (2) No business done; (3) No liquor delivered or consumed; (4) Premises being open not sufficient to warrant a conviction.

Held—The conviction was right. The section provides the premises must be *absolutely closed* within the prohibited hours. Here it was not denied they were open, although no business was done; the door being open the premises could not be said to be absolutely closed.

THIS is an appeal from a conviction had before a stipendiary magistrate in the central district for a breach of the 19th section of the License Act, 1875, which *inter alia* enacts that "all licensed houses shall be absolutely closed and no business whatever done therein, and no intoxicating liquor delivered or con-

sumed between the hours of ten, p. m., and six, a. m., from the first day of April to the thirty-first day of December, both inclusive." To this part of the section no specific penalty is attached, but there is in a subsequent part of it for selling intoxicating liquor on Christmas Day and Good Friday. I may observe the appellant was sued for the penalty under the 26th section of the Act, which provides that if any person holding a retail license shall be guilty of a violation of the provisions of the Act, or of the conditions of his license, for which there is no specific penalty, he shall be liable to a penalty for every offence not exceeding twenty-five dollars.

The complaint was that O'Neil had the shop door of his licensed premises open at 5.30 a. m. on the 21st of August last, which was sustained and not attempted to be contradicted, but there was no proof offered of any business having been transacted nor of any liquor having been delivered or consumed. Upon this the magistrate convicted the appellant and fined him twenty dollars, and in default of payment twenty days imprisonment.

The accused appealed upon the grounds that to render him liable to the penalty it was necessary to prove that during the prohibited hours: (1) The premises in question were not closed; (2) That business was being done therein; (3) That intoxicating liquor was delivered or consumed; (4) That it is not sufficient to prove only that the premises were not closed.

Mr. Kent, Q. C., was heard against, and Mr. Lilly in support of the conviction.

The Act of 1875 is apparently based, or at least in part, on the Imperial Act 38 Vic, cap. 49; by that Act there is no specific penalty imposed by the section which prescribes the hours for keeping the premises closed, and there is no general penalty clause as in our Act; but by the 9th section, when during those hours any person sells or *exposes for sale* in such premises (licensed) any intoxicating liquors, &c., the penalty would attach, and, in the present case, even under the provisions of that or a similar enactment the appellant would have been liable. For appeal decisions under that Act see *Brigden vs. Heighes*, 1 V. B. D., 330; *Tassell vs. Overden*, 2 B. D., 383.

The section under which the complaint made and the conviction had is emphatic in its terms in declaring that all licensed premises shall be *absolutely closed*, &c., as above. It would be difficult to imagine that premises could be absolutely or completely closed at 5.30 a. m. on the day in question and yet have

the door of the shop for the vending of intoxicating liquors where customers usually, if not invariably, enter, open to the public. If the contention of the appellant be well founded, it would not be illegal to have the licensed premises fully open throughout the night if the licensee were not detected in transacting business or permitting intoxicating liquor to be delivered or consumed, in which case the absolute prohibition would be ineffectual. It is evident enough that business might be transacted and liquor delivered or sold within the named hours, and yet the premises closed all the time. I can perceive nothing incongruous in the legislature declaring, as in my opinion it has done, that any one of the three acts specified in the 19th section should be regarded as a separate offence if committed within the prescribed hours and without the conjunction of the other or others, and as plainly declared as if the Act had said a licensed publican shall keep his premises absolutely closed, he shall not transact any business, nor shall he vend any intoxicating liquors between the hours mentioned.

Mr. Kent contended that as the act was a penal one it should receive a strict construction, but this rule should not be applied to detract from the plain meaning of language used by the legislature. Both English and American jurists have recognized the principle that penal statutes were to be construed reasonably according to the manifest meaning of the words, so as to give effect to the intention of the legislature according to the ordinary rules of grammatical construction. The general principles of construction apply to all Acts whether penal or remedial.

Considering that this is the first offence under the license Acts with which the appellant has ever been charged, and that there was no defiance of the law respecting the hour as the wife of the appellant recognized it at the time expressing her belief it was past 6 a. m., I think the fine should be reduced; at the same time I consider the constable acted properly in making the complaint before the magistrate.

My brother judges concur in this judgment.

Mr. Kent, Q. C., for appellant.

Mr. Lilly for complainant.

1892, *January*. HON. SIR F. B. T. CARTER, C. J.

Municipal Act, 1838—Construction of—Laying down pavement—Jurisdiction of magistrate—Appeal.

On a complaint by the chairman of the St. John's Municipal Council against the defendant for not laying a side walk, the magistrate held he had no jurisdiction to try complaint.

Held—On appeal, that under section 28, cap. 80, con. stat., the magistrate has jurisdiction to try complaints for the nonfeasances under section 15.

THIS comes before the court in the form of a special case, submitted by one of the stipendiary magistrates for the central district, as follows:—

“On the 12th day of October, A. D. 1891, at St. John's, in the session court, before the undersigned police magistrate, the above-named defendant was complained of for that she ‘being the owner and proprietor of a certain house abutting on Duckworth street, in the town of St. John's, has failed as by law required, and under and by virtue of an Act passed in the fifty-first year of Her present Majesty, entitled ‘An Act to provide for the municipal affairs of the town of St. John's, and for other purposes,’ to lay or cover the path appropriated, in front of her said house, for foot passengers with stone or plank.”

The said information having been heard before the undersigned, it was determined by him that he had no jurisdiction from the Act under which the information was laid to impose a penalty, and he accordingly dismissed the complaint.

Against this decision the informant, relying on the general words of section 28, cap. 80, of the consolidated statutes, which is the Act referred to, appeals.

The holding of the magistrate is, that section 28 relates back and is confined to the subject matter of the 27th section, and that that the penalty inflicted by the 28th section is limited to the misfeasance created by section 27. The last sentence of section 28 plainly indicates that the section is controlled and confined by the 27th.

For other misfeasances and non-feasances under the Act there are penalties specially provided, and these are recoverable summarily before a justice for the district—sections 21, 29 and 30.

The complaint is for a non-feasance under section 15, for which no penalty is specially provided.

If the opening sentence of section 28 were a separate substantive section providing a penalty for disobedience to orders generally, not providing penalties of the Governor in Council

(now the Municipal Council for the purposes under discussion) under this chapter of the consolidated statutes, the summary jurisdiction would be unquestioned.

The question for the opinion of this honourable court is:—

“Does section 28 give the magistrate jurisdiction to deal with a non-compliance with or disobedience to section 15?”

“(Signed),

J. G. CONROY, S. M.”

The 27th section of the Rebuilding Act prohibits the building, &c., or proceeding to build, any house, &c., within the boundaries prescribed for the width of any road, street, &c., whether compensated for or not. In this section no specific penalty is provided, nor is there for the breach of the 15th, 16th, 19th, in either of these sections.

The 28th section declares that any person infringing the provisions of this chapter, or any order made by the Governor in Council, without adding, as it should properly have done, “When not otherwise provided for,” shall be subject to a penalty not exceeding fifty dollars, to be recovered in a summary way before any stipendiary justice for the central district, &c.; and then proceeds: “That all buildings or erections which shall be commenced to be erected or constructed in contravention of *this chapter, or of such order*, shall be public nuisances, with power to abate, and the person wilfully committing such nuisance shall be subject to a penalty not exceeding \$25.” It appears that this latter part of the section not only imposes a penalty for a violation of the 27th section, but is also combined with a provision for the removal of any buildings improperly erected as public nuisances. The term “order” with reference to this subject, appears to refer to the orders which, by the 16th section, the Governor in Council is authorized to make and publish in the *Royal Gazette* for regulating the width of streets, lanes, &c.

It must be remembered that the Consolidation Act, 1872, did not profess to alter or amend the provisions of the Acts consolidated; and it will be found on examination of these Acts there was a general penalty clause. The amended Rebuilding Act, 13th Vic., cap. 10, passed in April, 1850, by the 10th section enacted “That any person infringing the provisions of this or any of the before in part recited Acts, or any order or orders, shall be subject to a penalty not exceeding £10, recoverable before one or more justices of the peace.” There was also at that time a specific penalty for certain breaches.

The first part of the 28th section referred to is not therefore a new provision, or as only applicable to the 27th section. It is somewhat of a conglomeration, but the language is sufficiently extensive and intelligible to apply to the 15th section as regards the non-laying down of a pavement by a proprietor without affecting the application of the residue of the section, which is clearly distinguishable from the first part of it.

There is only one question submitted by the magistrate, viz., that of jurisdiction, and which I think is conferred by the 28th section.

My brother judges concur in this judgment.

Mr. E. P. Morris for complainant.

Mr. Browning for defendant

STEER v. PHILLIP.

1892, February. HON. SIR F. B. T. CARTER, C. J.

Ship and shipping—Charter party—Demurrage—Fixed number of lay days—Liability of chartered for delay caused by bad weather.

By a charter party for a voyage with a cargo of lumber from one part of Newfoundland to another. Ten days were allowed for lay days and eight days for demurrage at a fixed rate. The master was unable, from weather and sea, to land the cargo within the lay days, and expended seven other days in so doing. In an action for demurrage for these seven days, the defendants contended that the state of the weather relieved them from liability.

Held—The defendant was liable for demurrage unless he could show that through some act of the plaintiff he was prevented from performing the contract. The state of the weather would not relieve the chartered from demurrage unless so stated in the charter party.

AFTER consideration of the arguments and cases cited, and the evidence given at the hearing, I am of opinion that the plaintiff is entitled to judgment for the amount claimed, viz.; \$112, being for seven days demurrage, at \$16 per day, of his vessel *Rose Mary*, chartered by the defendants in 1887 to carry a cargo of lumber from Port Lymington in this Colony to any port or ports not further west than Harbor Briton, calling at St. John's for orders if necessary; not to discharge cargo at more than two ports; if third port used, days of shifting from second to third port not to be included in lay days, which were

to be ten for discharging; defendants to have the option of keeping the ship eight days on demurrage over the lay days at \$16 per day. The vessel called at St. John's for orders, and took on board a super-cargo, who remained and directed throughout.

It is unnecessary to recapitulate all the circumstances of the voyage; but being unable, from the state of the weather and sea, to land at Grand Bank or Fortune, the vessel proceeded to St. Jacques on the 5th October, and there landed part cargo; on the 6th October sailed for Harbor Briton, and landed part cargo; on that day and to the 8th was detained there from the state of the weather from going to Grand Bank till the 13th; then sailed for the latter port and anchored there; ordered for Fortune next day; discharging there until Saturday the 15th, but had to leave there that day, on account of the wind and sea, for Harbor Briton; on the 18th directed to proceed to Burgeo, where and at Ramea, on the 24th of same month, finished discharging. The contract is absolute and not conditional in this case as to the charge for demurrage over the lay days; and, making allowance for Sundays, I think it is shewn there was a demurrage detention for the days claimed, under the charter party. The case of *Theiss v. Byers*, 1 Q. B. D., 241, decided that the state of the weather would not relieve the charterer from demurrage claim unless so provided; this ruling has since been considered and approved in *Budgett v. Bennington & Co.*, 25 Q. B. D., 320; and the general rule laid down as to the liability for demurrage or damages for detention in such contract is, "The defendants (charterers and indorsees of bills of lading) are liable, unless they can show that some acts or default of the owner, or of some one for whom he is responsible, prevented them from performing their contract." Like that, so in the present case, I cannot perceive that the defendants were prevented from performing their contract by any default of the shipowner, or of any of those for whom he was responsible. The cases of *Porteus v. Watney*, 3, Q. B. D., 227, and *Straker v. Kidd*, *Ib.*, 223, may be referred to in support of this position.

Mr. G. H. Emerson and *Mr. Berteau* for plaintiff.

Mr. Morison for defendant.

1892, *March*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Shipping—Construction of charter party—Deviation—Authority of master to bind owner.

The plaintiff's vessel was chartered by the defendant government to ply and cruise in Placentia Bay only on the bait protection service for a period and at a rate agreed upon. Whilst in Placentia Bay she was ordered into Fortune Bay by the defendants, and went there with the alleged assent of the master of the schooner, the son of the plaintiff, and whilst returning from there to Placentia Bay was lost. In an action for damages the defendants pleaded: (1) That the vessel was not hired for Placentia Bay only; (2) That the deviation was made with the consent of the agent of the plaintiff and with his knowledge, and exempted defendants from any liability.

Held—(Carter, C. J., differing)—The master had no authority to bind the plaintiff to the deviation, which was unjustifiable; the contract was for Placentia Bay only; the hiring conferred possession and control of vessel in defendants, and, the master being subject to the hirers' orders, the hiring was in the nature of a demise *pro tempore*.

THE plaintiff claims damages for the loss of his schooner, the *Annie Lewis*, hired, as set forth in his petition, on the 22nd November, 1888, by Sub-Inspector Sullivan, of the Newfoundland Constabulary, on behalf of the defendant government, to ply and cruise in Placentia Bay on the bait protection service for a period of twenty days certain at the rate of \$260 per month, upon condition, among others, that the schooner should ply and cruise in Placentia Bay only, and should be employed in the said service of Placentia Bay for such further period beyond the said days as a sailing vessel might in that behalf be required by the defendant government; that upon the said agreement being completed, said Sullivan placed Oliphant, a police sergeant, in charge of the schooner, to control and direct her movements upon the said service—the plaintiff's son, Hugh Coady, being master, subject to the direction of Oliphant; and further agreed that said Sullivan should meet the schooner in Placentia Bay, whenever necessary, to give fresh orders and directions; that the schooner entered upon the service in Placentia Bay aforesaid for some fourteen days, when Sullivan, being at Harbor Briton, in Fortune Bay, ordered Oliphant with the schooner, then being at St. Lawrence, in Placentia Bay, to meet him at Burin, also in Placentia Bay, to receive directions; upon arriving there was ordered to St. Lawrence, where a telegraph despatch was received by Oliphant from Sullivan to proceed with the schooner to Harbor Briton aforesaid, to which the said master objected; that the said schooner

accordingly proceeded there, and, after remaining four days, was ordered by Sullivan to return to Placentia Bay aforesaid, and whilst so proceeding on the 18th December in the year aforesaid, was overtaken in Fortune Bay by a violent S. E. gale and snow storm, was driven on shore and totally lost on the north-west side of the Island of St. Pierre. Besides the alleged value of the schooner at \$2,500, plaintiff claims incidental damages to \$1,000.

By the answer of H. M. Acting Attorney General for the defendant government, it is admitted the plaintiff's schooner was hired at the date for the purposes, period and rate set forth in the first paragraph of the plaintiff's petition, but denies it to be true as set forth that the schooner was to ply and cruise in Placentia Bay only and should be retained and employed in the service in the said Bay only. Also admitted the ordering of the schooner by Sullivan from St. Lawrence to Harbor Briton, but denies it to be true that this was at any time objected to by the said master, Hugh Coady. Also admitted a sergeant of police was placed on board to control the movements of the schooner on the bait service, but denies it to be true that such control was confined to the movements in Placentia Bay only; nor is it true that Sub-Inspector Sullivan was to meet the schooner in Placentia Bay, whenever necessary, to give fresh orders and directions; nor is it true that the schooner was not hired for the service of both Placentia and Fortune Bays; nor that the plaintiff's schooner was of the value, or that she sustained damages to the amount and extent alleged; that the agreement for hire was verbal, and contained no agreement that would prevent the schooner being ordered to Fortune Bay, or wherever her services would be required in the bait protection service.

That the loss was from lack of seamanship in the navigation, and from the want of necessary equipment of the schooner; and, at the time of the loss, she was proceeding to Lamaline on the private business of the plaintiff, and whilst endeavoring to reach that port she had to run to St. Pierre, where, from unskilful navigation, she was lost. That petitions were presented by the plaintiff to the Governor in Council, also to the House of Assembly, praying compensation for his loss in respect aforesaid, and that upon an address from the latter body, as set forth, to the Governor in Council, \$1,000 was, in accordance with said address, paid out of the colonial treasury to Sir Jas. S. Winter, acting for and on behalf of the plaintiff, in full of

all claims on the government and in satisfaction of all damages sustained by him, and for remuneration by reason aforesaid.

This action was commenced in May, 1889. Answer filed in September, 1891, and issue thereon.

These are substantially the statements of the respective parties, in which, while agreeing in some of the allegations, yet in others of a material character, they totally conflict. This is another illustration of the many cases which come before our courts for decision, which, at the onset, if a little prudent care had been observed in clearly reducing the agreement to writing, would in all probability have averted this litigation.

This is rather a novel action, but as observed by Chief Baron Pollock in a case before him, "Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees." Before we can apply the law, we must first ascertain the facts, so far as we can do so from the evidence taken out of court, not having the assistance of a jury for that purpose. I have taken extracts of the evidence on all the material points to which, so far as I think essential, shall hereafter make reference, and need not be repeated here in full. The gerin of this proceeding is the agreement or arrangement made between the plaintiff and Sub-Inspector Sullivan, whose authority in that respect is undisputed. They were apparently the only persons present at the time, for although the plaintiff says he then called Hugh Coady, the master, into the room where they were, and told him he was hired for Placentia Bay; yet Hugh Coady does not confirm this in his examination, and Sullivan testifies the two only were present; besides this, Hugh Coady states that he knew nothing about the agreement. The plaintiff declares he was hired for Placentia Bay only, on the Bait Protection Service, at \$260 per month for 20 days, and as long as a sailing vessel should be required. Sullivan had two men in Cluett's vessel, who were to come on shore in the morning. Sullivan states these two were police officers the government was to victual on board; owner to find, pay and victual the crew. It does not appear Fortune Bay was mentioned by either, but plaintiff states he would not have gone to Fortune Bay, while Sullivan as positively declares he hired for the Bait Protection Service; he wanted the vessel for Placentia Bay at the time, and so far as he believed, and still believes, he had a right to send her into Fortune Bay or

any other place where she might be required on the service. There was no agreement or understanding on his part that the schooner during all the time she might be in the service should be kept in Placentia Bay. Fortune Bay, he states, is more easily navigated than the other. At the time of the agreement the plaintiff further stated that Sullivan said he would go down to see the vessel in about two weeks as he might want to make some alterations with his men; this is flatly contradicted by Sullivan. When at St. Lawrence, about 11th December, having in the meantime plied in Placentia Bay, Oliphant, the police sergeant on board, had a message from Sullivan at Harbor Briton, to come on there; arrived there shortly afterwards, and remained there until 17th of same month. Neither at St. Lawrence to Oliphant, or at any other time at Harbor Briton to Sullivan, did the master object to going or having gone to Harbor Briton, as they testified, but he did say to Oliphant, on the way there, when he wished to go into Lamaline and Oliphant had made some remonstrance, fearing a change of wind and the difficulty of getting out, that he would not go on the mission to ply both bays for \$400 per month, but even then it does not appear he objected to proceeding; he also states, when ordered by Oliphant to Harbor Briton, he objected, and said that he did not understand the vessel had to go to Fortune Bay, or he would not have been in her if he knew he was to go on that mission. While Oliphant states, when he shewed the message from Sullivan to go there, he made no objection, and remarked "whatever you say I am ready." The plaintiff states he was not aware of the vessel having left Placentia Bay until he heard of her being at Fortune Bay; and Sullivan states if he had not considered he had a right to order her there, he would have first wired the plaintiff for permission. There were telegraph offices at all the places, and there was no protest made by the plaintiff although he had knowledge of the vessel being in Fortune Bay. There was a good deal of questioning about the vessel going into Lamaline for the purposes of the plaintiff or master, where the plaintiff then resided; when returning from Harbor Briton to Placentia Bay, where she had been ordered, the master states he did not know she was going there on the day of the loss (18th December) on the private business of the plaintiff; he had no control over her movements from place to place, as he was only sailing master; while Sullivan states he asked permission to call there for provisions, and this is confirmed by Oliphant. It was in attempt-

ing to get there in boisterous weather, as described in the evidence, she had to run for St. Pierre in the locality of which on the same day she became a total loss. So far as I can gather from the evidence, and my view of the authorities referred to hereinafter, my interpretation of the agreement or arrangement is that the hirer or agent was to direct where the vessel was to ply on the bait protection service, the dominion and possession of the vessel and control of the navigation, with the owner or agent on the service. In arriving at a decision as regards the arrangement, we must consider the circumstances connected with the service on which the vessel was employed. In ordinary charter parties the port or ports are specified, but in this case we are aware the bait protection service includes both Placentia and Fortune Bays, and all parties resident about there may be assumed to have full knowledge of this. These bays and sinuosities form a continuous coast line, and those who own or employ coasting vessels, such as the plaintiff, are generally as well acquainted with one as with the other; the plaintiff insists he let his vessel for Placentia Bay only, while Sullivan as strongly asserts he hired for the bait protection service, but at that time only required the vessel for Placentia Bay, with the understanding she was to be at his direction for either Bay, and I am very much inclined to think, having regard to the service and circumstances, such was the understood arrangement, and that if the loss had not occurred without insurance we should not have had any legal proceedings arising out of alleged deviation or breach. The master, Coady, does not pretend that he said anything to Sullivan by way of objection when at Harbor Briton. Now, on a foreign voyage, where a charter party with the owner distinctly specifies the ports for which the ship is engaged, the master would have no implied authority to substitute another port for that specified, as in *Burton vs. Sharp, 2nd Camp. 528*, which is expressly stated to have been on a foreign voyage, the owner residing in England, but I do not regard that case as analogous to this, and it was a question of freight. The dominion and possession were, in my opinion, with the owner, or his agent the master, subject to directions where to ply within the limits of the voyage, and there was no coercion or forcibly taking away of the vessel, it was optional with the owner or master having the dominion to proceed or not if he were not bound to do so. This is not analogous to deviations in connection with insurance policies, nor where a charterer sues for damage to or loss of cargo in

consequence of deviation where the owner had the possession and appointed the master and crew, as in *Scaramanga vs. Stamp*, 495 C. P. D. ; *Garrett vs. Davis*, 6 Bing, 716. In these cases the parties were the reverse of the present. It was the duty of the owner to have given full instructions to his master, and his duty to obey them ; he was under no duress ; if he had any doubt he might easily have telegraphed to his owner close by, but even the owner did not protest when he was aware of the vessel being at Harbor Briton. I think it is sufficiently shewn that the vessel was staunch, fairly equipped and properly manned ; that the master was competent, both as master and pilot for both Bays ; and that the loss was not occasioned from the want of any skilful management of him or of the crew. The letters of Sullivan to plaintiff after the disaster clearly indicate his kindly feeling, and in expressing the hope and belief he would be compensated for his loss, and would do anything "consistent with truth and justice to assist him in his honest demands" ; in one of these letters, in reply to the plaintiff asking if his vessel was not engaged for Placentia Bay only, Sullivan replied "that he had given particulars stating the truth that his vessel was engaged by him for service on that, and also explaining why she was called to Fortune Bay" ; he does not admit Placentia Bay *only*, and his sworn evidence has been above given on this subject. From the loose manner in which the so-called agreement was made, there may well be diversity of opinion as to its exact terms.

There is another branch of the case on which the defendant government rely in defence, and that is, that the plaintiff received full compensation in satisfaction. It appeared he petitioned the Governor in Council on the subject 10th January, 1889, who considered he had not any legal claim. He was then advised to petition the House of Assembly. As we are aware, that body occasionally, after enquiry, recommend payments when they think an equitable claim has been established, although there may be no legal remedy, and it is not likely they would have entertained it if they so considered. A select committee, after taking evidence, recommended that the plaintiff be paid \$1,000 from the funds of the colony as compensation for the loss which he had sustained. Upon this an address to His Excellency in Council, in the usual form, of the 31st May, 1891, passed the Assembly recommending its favorable consideration. On the 6th June the Executive Council passed a minute as follows :—"On consideration of address from the

House of Assembly, on the petition of Joseph Coady for compensation for loss of his vessel whilst engaged in bait protection service, a sum of \$1,000 to be granted to him in full of all claims, and amount to be charged to the bait protection service." This was confirmed at a regular meeting of the Governor in Council on the 13th June, at which those present are named.

On the 12th June a warrant issued to the Receiver General for payment of \$1000 to the plaintiff, and on the same day the then Attorney General (Sir Jas. Winter) received the amount, who, after deducting \$800 for money the plaintiff states he owed him, paid him (the plaintiff) personally on the same day, by cheque, the balance of \$200. That he (the plaintiff) gave no receipt, and did not know where the money came from that gave those amounts of eight hundred and two hundred dollars; that Sir James Winter had no authority from him to receive the money, and never acted for him in this matter. He had written him on the 5th June (copy of letter in evidence), "that he understood Father Walsh had interviewed him with reference to plaintiff's case, and intimated to him that his (Sir James's) government would award him \$1000 for the present, provided he withdrew for the present from the court the suit lately instituted against the government; was satisfied, and agreed to stop all further proceedings for the present, upon the \$1000 being secured to him; would see him when the Crown prosecution (to be inferred then proceeding) was ended, and Sir James had time to spare." Plaintiff further deposed on cross-examination, "I believe there is no truth in the statement that on May 31, 1889, an Address passed the House of Assembly to the Governor in Council, requesting him to take into consideration the report of the committee. I don't know whether the matter ever came before the Governor in Council."

Mr. Fenelon, then Colonial Secretary, whose evidence was objected to, stated that the money was paid by the government on the understanding, among themselves (Executive Council), the law proceedings should be abandoned, or it would not have been paid; but he does not connect the plaintiff immediately with this understanding, nor knowledge of the decision, further than what may be inferred from the circumstances of the plaintiff's son (the late master of the vessel) calling upon him and objecting that the sum was too small; and that prior to the passing of the Address of the Assembly, he had told the plaintiff's son, above named, the government would not recognize any claim, as he had no legal claim.

It would appear from the plaintiff's letter of the 5th June to Sir James Winter that he was cognizant of the amount to be paid, and by the government; and it may not unfairly be inferred that he was also aware of the action of the Assembly upon his petition, upon which the Executive acted notwithstanding his own statement as above. Sir James Winter was a member of the Council at the time, and must have had knowledge of the circumstances. Plaintiff made him, as it appears, the medium of communication; he was paid the amount from the Treasury, the receipt of which is acknowledged, and may not his knowledge be fairly imputed to the plaintiff. The government apparently repudiated all legal liability throughout, and doubtless acceded to the recommendation of the Assembly to pay the \$1000 as compensation, which we may assume meant full compensation so far as the public funds were concerned, in the belief that further proceedings would have ceased. This is not the same as a money demand for a larger sum than an amount paid as alleged in satisfaction, but for unliquidated damages, on at least a doubtful claim.

Now, assuming that the agreement between the plaintiff and Sullivan was as he states and contends, that the plying of the vessel upon the Bait Protection Service was to be confined to Placentia Bay only, has the plaintiff shewn a legal ground of action for breach of the alleged agreement or contract. It may be asked, of what does the breach consist, in violation of the compact to be deduced from the foregoing circumstances. The dominion of the vessel was with the plaintiff, and that had not been parted with; the defendant's agent gave a direction, the plaintiff's agent acceded, and, from tempestuous weather, the vessel, while under his control, is lost. This is not like a case where the ship has been demised, and the entire control with the charterer who wrongfully, and without the will of the other having power to do so, takes her out of the prescribed voyage or course, and damage ensues.

Suppose a person hired a vessel to trade in Placentia Bay and placed a super-cargo on board to direct at what harbors she should call for the purpose of the adventure, and he, or even the hirer, requested or directed the master to call at a place in Fortune Bay, who assented, or at any rate went without compulsion, and while there the vessel, from stormy weather, became a wreck, could the owner recover from the hirer in damages for his loss? I apprehend he could not. If he could the hirer might stand in a worse position than an insurer. Even

a man who takes possession of a ship by consent of plaintiff's agent is not liable to an action of trespass.—*Mills vs. Dawson, Peakes' Add. Cas.* 59.

Questions have frequently arisen as to the construction to be placed on a charter party, as to whether the owner or charterer had the dominion and possession, but they chiefly relate to right of lien for freight, or which of the parties should bear certain charges when not expressly provided for; such as the *Trinity House vs. Clarke*, 4 *M. and S.*, 288; *Lautle vs. Campion*, 2 *B. & Add.*, 503; *Hutton vs. Kragg*, 7 *Taun.*, 186; *Dean vs. Hogg*, 10 *Ling.*, 345; *Great Eastern*, 2 *L. R. A. & E.*, 93.

The case of the *Omond and Cleland Coal and Iron Co. vs. Huntly*, 2, *L. R. C. P. D.*, 464, is more in point, where charterer sued the owners for loss of cargo. The steamer was let for the sole use of the charterers and their benefit for specified time, with option for a longer time; officers and crew to be provided and paid by the owners and placed under the direction of the charterer, merchant or his agent, to be by him or them employed for the conveyance of merchandize; they to have the whole reach of the holds, except space required for crew; to pay for coals, &c., and to be delivered up to the owners at the termination of the charter party at Clyde. The vessel was lost from stranding when carrying a cargo of coals to Dunkirk by direction of the plaintiff, from the negligence of the master and crew. The contention was as to the true construction of the charter party, whether master and crew were the servants of the plaintiff, and which was liable for the loss. The court held they were the servants of the defendant, the owner, and he was responsible.

The summing up of all the cases may be said to be that the court, when the contract is in writing, will look at all parts of it to ascertain the intention of the parties apart from mere technical language, and the same rule, I apprehend, would be applied when oral, so far as its terms can be defined, having due regard to all the circumstances. I cannot find any case similar to the circumstance of this, and it appears to me that to render a hirer responsible for such damages as are here claimed, there should have been some act shown which would amount to a malfeasance, as I regard the master and crew to have been the servants of the owner and not of the hirer.

I am sorry for any loss the plaintiff may have sustained, which, we are aware, frequently happens to uninsured owners of ship or cargo, and if I regarded that the plaintiff had estab-

lished his case, I should, from the discrepancy in the estimated value of the vessel, upon which the defendant had not given evidence, have considered it necessary to refer the matter to the master, with directions respecting incidental losses if deemed recoverable, but having arrived at the conclusion that the plaintiff has, in my opinion, after anxious consideration, failed to sustain his action, I have no alternative than to pronounce in favor of the defendant.

HON. MR. JUSTICE PINSENT:

It is contended on behalf of the government that the service agreed for was not exclusively for Placentia Bay, and that it was within the contract to take the vessel into Fortune Bay; that she was so taken with the consent of plaintiff's agent, the master of the vessel; that her loss was occasioned by unseaworthiness, and by unskilful management; and that if there is any cause of action it is one of tort, for which the government would not be answerable, and for which the plaintiff would have to seek indemnification from those who did the wrong.

Before taking these proceedings the plaintiff made application to the Executive for payment, and as there was no response to this for some time, he filed his petition in this court under the "Claims against the Government Act."

After the initiation of this action, the Legislature being in session, the plaintiff petitioned the House of Assembly in the matter. A committee of that body reported in his favor, and the House passed an address to the Executive recommending a payment to the plaintiff of \$1000. The Governor in Council regarded the address favorably, and a warrant in favor of the plaintiff for the sum of \$1000 was sent to the treasury. This sum the attorney general of the day received, and after deducting an amount of \$800, due to him by the plaintiff, gave him a cheque for the balance of \$200.

The plaintiff gave no receipt, but he does not dispute this payment of \$1000; he says, however, that he did not take it in full discharge of his claim, and that he authorized no one to accept it.

The government, on the other hand, proves that the Executive minute approving the payment, expressed it to be in full of plaintiff's claim, but this proceeding, in the absence of the plaintiff being a party to it, is only a unilateral act.

There is no evidence that this condition was ever communicated to the plaintiff; but there is evidence that sometime before he received the amount, and after it came to his knowledge the Legislature had recommended \$1000, he wrote to the attorney general, stating that he understood this payment would be made upon his agreeing only to stay proceedings "for the present," and that he would take it "for the present." It is also shown that his son in conversation with the colonial secretary of the day, objected to the amount as being insufficient. Now, no knowledge (if there was any) on the part of the attorney general as such, of a condition imposed by the government could be attributed to him in his capacity as a creditor of the plaintiff, so as to bind or affect the plaintiff's rights.

It appears to me that we are thus thrown back upon inquiry into the original merits of their claims.

Without going into the details of the evidence, it seems to me to be clear that, whatever reservation or impression may have been left on Mr. Sullivan's mind, the whole of the circumstances points to a contract for service in Placentia Bay only, and the commissioner's own letter subsequent to the loss (for the original agreement was oral only) confirms this view.

Next, as to the consent of the master of the vessel to a deviation from this contract, it does not appear that he was acquainted with the particulars of the contract; and it seems to me he had no authority to bind the plaintiff to any change of terms (*Burton v. Sharp, 2 Camp., 529*); while on the other hand it is plain that the control of the ship with regard to the service she was engaged in, was in the hands of the commissioner and his subordinate officers on board of her.

I am, therefore, of opinion, that there was a breach of contract in taking the vessel into Fortune Bay. I am equally clear that by reason of this deviation she was lost, and that any imputation of unseaworthiness of the vessel, or culpable navigation in the master, is wholly without foundation.

The evidence for the defendant alone entirely disposes of this contention. The commissioner himself speaks in high terms of the character of the ship, and of her management.

The remaining question with me then is one of damages; and while I am of opinion that the plaintiff is entitled to recover the value of the lost ship, I do not sustain his claim for damages by reason of any further loss in earnings or otherwise, because the only definite period for which he was engaged was twenty days, which had expired, and after that his ship was subject to be discharged from the service at any time.

The plaintiff claims in this action a much larger amount for the value of the vessel than I am disposed to allow him, and as he offered originally, so far as the ship was concerned, to accept one which could then be purchased for \$1,500, the justice of this case will probably be met by allowing him the difference between the \$1000 he has received and that sum. My opinion is that the plaintiff is entitled to judgment for \$500 and costs of suit.

HON. MR. JUSTICE LITTLE:

There can be no doubt as to the real intention of the parties at the time the agreement was so entered into. Mr. Sullivan's statement that he believed and still believes that the vessel, under the terms of the agreement, could be employed in the service in Fortune Bay or elsewhere appears to be merely an opinion of his own as to a construction the agreement was capable of bearing, and is entirely opposed to the plain meaning of its language and to the desires and intentions of both parties at the time. Clearly, such a construction would impose an obligation on the letter of the vessel to go to any part of the sea-board of the southern and western coast to which the commissioner might order in the bait protection service. The terms of the agreement are by no means so elastic, and, in view of the evidence, cannot be so construed.

We have, in the history of the incidents of this case, to deal with that which is advanced as a final settlement of all claim the plaintiff had or can have against the defendant government for the damages occasioned by reason of this loss. For this purpose it is sufficient, in the first place, to refer to the exhibits in evidence relative to the action taken by the government on the address from the House of Assembly, and the result of that action. Well, on the 6th of June, 1889, the matter had been favorably considered by the Governor in Council, as appears by the following copy of minute in the exhibit: "On consideration of address from House of Assembly on petition of Joseph Coady for compensation for loss of his vessel while engaged in the bait protection service, a sum of \$1,000 to be granted him in full of all claim, and amount to be charged to bait protection service." It appears a warrant was thereupon sent to the Receiver General, directing the payment of this amount, but without specifying any condition

or making any stipulation as to its being a payment in full or otherwise. On the same day the money was paid over as appears by the following receipt:—

“Received from the Receiver General of this Island the sum of \$1,000, being for the service specified in the accompanying warrant, No. 281, for Joseph Coady. (Signed), J. S. WINTER.”

Now, it does not appear in evidence that Coady had been informed or had any knowledge of the purport of the minute of council of the sixth of June. It is stated by Mr. Fenelon in his evidence that he informed Coady's son of the appropriation of the \$1,000 to meet the claim, and that the latter stated it was insufficient to cover the amount of the damage sustained. But, as a matter of fact, Coady swears he was not aware the matter came before the Governor in Council. He received the money, however, from the government in June, by cheque for two hundred dollars from Sir J. S. Winter, who retained eight hundred for a debt due by Coady. He further deposes that at this time these proceedings had been instituted, and that Sir J. S. Winter never acted for him as attorney in this matter, nor had he any authority from him to receive the amount paid over, nor was any payment made to or received by him in full for this claim. In this connection there is in evidence a letter dated the 5th June, 1889, from Coady to Sir Jas. S. Winter, the then Attorney General, in which the former states it was intimated to him that if he withdrew these proceedings for the present the government would pay him \$1,000; he states: “I am satisfied and agree to stay all further proceedings *for the present* upon being secured the \$1,000.”

Obviously, if the receipt given at the treasury for the amount had been given in conformity with the terms of the minute of council of the sixth of June, or if it appeared in evidence that its purport had been brought to Coady's knowledge before he received the two hundred dollars, he would be estopped in the prosecution of this claim; but where we have his positive swearing to the contrary, that he had no such information or understanding at the time, and that on the day before the money was allocated and paid over he expressly stated in his letter to the Attorney General, not that he would accept it in full discharge of his claim, but that he would stay the proceedings for the present, one is constrained to accept the fact that there was no such finality of the claim in the payment as is contended for by the defence.

Such then being the agreement made between the parties, its alleged breach and the cause of its termination, it becomes necessary to ascertain what principle of interpretation is deducible from the agreement, or what rule of interpretation should be applied in order to determine the liabilities and duties of the parties *inter se* under the data and circumstances given in evidence.

In contracts of charter parties and of freightments difficulty has been repeatedly experienced in determining the nature and extent of the rights acquired by the charterer or hirer, or retained by owner in and over the vessel chartered or let to freight.

We find the subject and the principles involved in its adjudication lengthily discussed and pronounced upon in the reported cases of *Hutton vs. Bragg*, 7 Taunt, 14; *Fute vs. Meek*, 8 Taunt; *Trinity House vs. Clark*, 4 Maul and Selvin; *Christie vs. Lewis*, 2 Brodrip and Bingham, and other such cases.

These cases, it is true, related to contentions arising out of special contracts of charter party or affreightment, still there will be found some rulings relevant to the issues on this record. For instance, we find that a vessel may be let with a stipulation that the services of the master and crew may be let together with the vessel, they still continuing to be the servants of the owner, and hired, fed and paid by him. The possession, such as it is, of the captain and crew is not retained by the hirers of the vessel to interfere with the full and free use of the vessel, but as subsidiary and subservient to it. It is, says Lord Ellenborough, the same thing as the hire of a waggon and team, the proprietor thereof stipulating that the waggon should be driven and the horses cared for by his own servants. As regards the vessel, such an appointment does not make it less a letting of the ship.

As a consequence the letting may be held to confer the temporary possession and control over the chattel hired under such circumstances. But it is aptly observed that as to what is to be adopted as the respective criterion of such case, if any specific agreement exist, we must have recourse to it to decide the real intention of the parties. The court pays more attention to the intention of the parties as manifested by the agreement, than to special clauses and the use of technical terms.—*1 Walford on Parties' Action*, p. 140. Where then it appears from the language of the agreement to be the intent of the parties to invest the hirer with the possession of the vessel, there

being nothing incongruous in the provision in the agreement for the retention of the captain and crew, it may be taken, in my judgment, to constitute the hirer the special proprietor of the vessel and to transfer to him the temporary right of possession.

I hold, therefore, that under this agreement this vessel was hired to the defendant government to be engaged in the protection of the bait service in Placentia Bay for a term of at least twenty days, for which the owner was to be paid at the rate of \$260 per month; that the captain and crew were engaged, paid and fed by the owner, for the purpose of managing and navigating the vessel to such ports or places in the bay as ordered by the agents and servants of the defendant government, and as the exigencies of the service might call for. The nature of the hiring appears to me to have conferred on the defendant government the control and possession of the vessel for the time agreed on, or so long as she might be continued in that particular service under the agreement; the master and crew were subject to the hirer's orders, and the general management and control being given to the defendant government or its agents; the position does then assume the character of a demise of the vessel *pro tempore*. However, there can be very little question about the restricted character of the agreement; clearly the service was confined and limited to Placentia Bay, removing and causing the vessel to leave that bay, and changing her cruising ground outside of that bay and into Fortune Bay was clearly a breach of the agreement; and even if the captain had assented to such change (which he swears he did not), that would not in itself be sufficient to relieve the hirer of liability for the consequences of his act. A captain has no authority as such to vary or alter or rescind the agreement originally entered into by the owner.—*Burgen vs. Sharp, 2 Camp., 528.*

The vessel was removed without the owner's privity from Placentia Bay to another locality, some sixty miles distant from where she was hired and engaged to ply, and this deviation from the lawful use of the vessel as agreed on certainly resulted in the loss and damage complained of.

Some of the authorities cited refer to analogies existing between cases relating to the letting of vessels to hire, and cases in which chattels of another kind or character are hired; and as a general principal in relation to the bailment of chattels generally, it is stated in *Beaven on Negligences, p. 506*, that if a

party uses the chattel bailed in a different way or for a longer time than that for which it was hired, he will be liable for all accidents happening to the chattel while under his control, even though they may arise from inevitable accident.

Under the evidence I think it is abundantly shown that this loss would not have occurred but for the breach of the agreement on the part and behalf of the defendant government, that it was its result and consequence, and that the plaintiff is legally and equitably entitled to be compensated therefor.

I therefore consider him entitled to a judgment at the hands of this court for the sum of \$500, in addition to the amount already paid by the defendant government at the treasury, on account of this claim.

Mr. Morison and Mr. Pittman for plaintiff.

Hon. E. P. Morris for defendant.

THORBURN v. WHITEWAY.

1892, *April*. LITTLE, J.; CARTER, C. J.; PINSENT, J.

Shipping — Salvage — Temporary abandonment — Salvage services — Wreck and Salvage Act, 1880.

A craft came up with an abandoned schooner, and having taken her in tow, conveyed her to port. On the route the salvors were met by a tug with members of the crew of the salvaged vessel on board, who were returning to their vessel in the hope of saving her. A claim was made on the owners of the vessel salvaged for salvage. The owners contended there was no liability on the grounds (1) no abandonment; (2) forfeiture of any claim by non-compliance with the Wreck and Salvage Act which imposed on them the duty to deliver wreck to Receiver General.

Held—The salvors were entitled to salvage although there was only a temporary abandonment; the services were meritorious, the vessel having been rescued from impending danger. Where the derelict is returned to the owner, as in this case, the provisions of the Wreck and Salvage Act do not apply.

THIS action was tried during the last term of the court before me without a jury. In the statement of claim annexed to the summons, the plaintiffs, Sir R. Thorburn, as owner, and Reid, as master of the schooner *Speedwell*, claimed to be entitled to recover from the defendant, as registered owner of the schooner *William*, the sum of four hundred dollars for salvage services

rendered the *William* off this coast in the month of July last, and also for money paid for services and work and labor done and expended in and about her whilst in charge of the plaintiffs.

From the facts given in evidence at the trial, it would appear that the *Speedwell*, whilst on a voyage from Trinity to Saint John's, and at about two o'clock in the morning of the 29th of July last, being at the time one mile and a half off Logy Bay, came across and nearly ran into the schooner *William*, then on her beam-ends, with only a small part from forward to the corner of the transom over water.

It was a dark night, the *Speedwell* had passed the wreck, but was hove round, a boat launched and the wreck, on being boarded, was found to have been abandoned, no one being on board nor any boat or other craft near or in sight of her. She was full of water. the masts with the sails set were under water, and the sea washing over her rendered it impossible for the sailors to remain on her. The sea was smooth with a light wind blowing from the southward and westward, which subsequently veered to the eastward.

The captain of the *Speedwell* with his crew succeeded in passing tow lines under the *William's* fore-shrouds, and also from her quarter and rigging to their vessel. and then managed to take her in tow. After towing her a short distance, and finding the wind veering in on the land, a boat was sent to Saint John's for a tug or steam launch. Two men had boarded the *Speedwell* from the shore, and one of these went in the boat with the *Speedwell's* men to procure the tug. When off Sugar Loaf, very little way being made, the tow lines parted and had to be again secured to the wreck. At nine o'clock in the morning, the steam launch belonging to the plaintiff, Thorburn, with the *Speedwell's* boat in tow, reached the wreck. They at once attached a warp to the *William* and succeeded in towing her to St. John's, where they arrived between one and two o'clock p. m. of the same day. They hauled the *William* alongside the wharf of Thorburn and Tessier, who employed men, hove her upright and safely secured her. The canvas was unbent, and dried and stored, also a seine, ropes and other gear. It was found she had no cargo, and some salt that had been in her before the casualty, had been washed out of the hold. She was a schooner of thirty-eight tons, well built, fully equipped, and worth, as deposed to, about \$1200.

It appears that whilst the salvors were engaged in getting

the wreck into St. John's, and before the plaintiff's steam launch came to their aid, the steam tug *Daisy* approached, having on board two of the *William's* crew, taken from the vessel with which she was said to have collided.

The captain of the *Speedwell* deposed that he was not aware these men were in the *Daisy*, and that the captain of the latter, on arriving at the wreck, asked him if he would give him a chance if he found he was unable to tow the *William* into St. John's; that he replied he could'n't say until his boat returned from St. John's.

It also appeared that the *William* had been built by one Seward, a planter of Fox Harbor, Trinity Bay, for the purposes of his own trade and business. That when the casualty or running down occurred, she was in charge of his captain and crew, then about to proceed to Labrador on his account. That immediately on receiving information of the collision and salvaging of the schooner, he came to St. John's, and on the morning of the 4th of August called on Messrs. Thorburn and Tessier, and was informed they retained the vessel for a claim of \$400 on behalf of the salvors, and that the vessel would be retained until payment would be made, or security given for the amount. Whereupon the following letter, on the 5th of August, was addressed by defendant to Messrs. Thorburn and Tessier:—

"The *William's* case.—If you will allow us to take the schooner for purpose of repairs, we guarantee that she shall not leave our hands until claim of Reid is settled and paid; and meantime she shall be held to be in your custody, and recognising Reid's claim for services, which we hope may be settled by arbitration.

Yours truly, (Signed), "WHITEWAY & JOHNSON."

Mr. Tessier deposed that when this letter or security was brought, the parties were at liberty to take the vessel. Before this date it was admitted by counsel that some negotiations had taken place between the parties interested. It appeared, however, that after this date the vessel remained for a further time in charge of Messrs. Thorburn & Tessier, on foot of the following letter given in evidence:

AUGUST 6th, 1891.

In re claim of Reid against schooner *William*.—After writing you in re *William* yesterday, offering that if your client let us have the vessel to repair, she should yet be held to be in your custody until (alleged) salvage claim is paid. Seward informs us that for a few days he cannot provide the necessary cost of dockage and repairs. Meantime please care for the vessel at your wharf.

Yours truly, (Signed), WHITEWAY & JOHNSON.

Other letters and communications passed between counsel, and were received in evidence, but as they do not affect the rights of parties, and as Mr. Johnson and Mr. Horwood admit that there was no material delay after the 6th of August, in relation to the possession of the vessel on the part of those having her in charge, the letters thus interchanged may be omitted.

From the evidence of the captain of the *William* it also appeared that there were five men and a woman on board at the time of the collision, which occurred at about nine or ten o'clock of the night of the 28th of July. The vessel was greatly damaged and filled immediately, and they merely had time to get away from the *William* on board the colliding vessel. The captain of the latter refused to lie by till the morning as his vessel was making water, and consequently he proceeded on to St. John's. When off the narrows, three of their crew boarded the steam-tug *Daisy*, and returned to the scene of the wreck, and the captain came on to St. John's. The captain and men deposed that it was their intention on leaving the *William* to obtain assistance and return to save her.

Under all the circumstances the learned counsel, on the part of the defence, contended in the first place that there was no abandonment of this vessel, and salvage service could not be recognised as having been necessarily rendered. But the principal ground relied on as sufficient in itself to preclude the plaintiffs from receiving or recovering any reward or compensation at the hands of the court for their services was their alleged non-compliance with the provisions of the Act of the Legislature, entitled "An Act respecting Wreck and Salvage," 43 Vic., cap. 9. Under this Act it was contended that the salvors not only lost any right they might have had to salvage, but subjected themselves to the penal provisions of the Act for failing to comply with the obligation thereby imposed on them to deliver the vessel to the receiver general or a commissioner of shipwrecked property in accordance with the terms of the Act.

After due consideration of the evidence and all the circumstances attending the salving of the vessel, and also of the matter of law relied on by counsel for the defendant, judgment was rendered in favor of the plaintiffs for \$120, in which was included the cost of services of the steam-tug.

Subsequently counsel were heard in argument before the court on a rule granted on defendant's motion for a rehearing or for entering judgment for the defendant, on the grounds moved on and set out by him at the trial.

Although this minute history of the case may appear unnecessary in view of the small amount at issue, still, owing to the apparent novelty and peculiarity of the question raised as to the application of the statute to such a case, this particularity was found unavoidable.

Under the circumstances detailed counsel for the salvors had, it must be admitted, substantial grounds for contending that they were at the time justified in regarding the *William* as derelict. Her condition was such as to render it impossible for any person to remain in her or upon her deck, nor was there any other vessel or craft in sight of her at the time. She was found nearly completely submerged, her sails still bent, the anchors at the cat-heads, all clearly indicating that the casualty resulting in her wrecking had been sudden, and that her crew were obliged to hastily abandon her.

Illustrative of some of the conditions under which a vessel may be regarded as derelict in connection with a condition of things evidencing a temporary abandonment, we may appropriately cite the following extract from the judgment of Dr. Lushington, in the case of the *Coromandal*, reported in *Sirby*, p. 206: "It may be perfectly true the master and men, when they got on board the *Young Frederick* from their ship and sailing for Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that the case every day? A master and crew abandon their vessel for the safety of their lives, he does not contemplate returning to use his own exertions; but a master hardly ever abandons a vessel on the coast without the intention, if he can, to obtain assistance to save his vessel. But that does not take away from the legal character of 'derelict.'"

The test is whether the crew left her primarily for the purpose of saving their lives or of obtaining assistance in their trouble—a mere statement to the effect that they hoped, or wished, or thought of returning, is not sufficient in itself to prove the vessel was not derelict.

This, then, being the character so assigned to the *William* under the circumstances, we find that even if the vessel is derelict the fact is only to be considered as an ingredient in the degree of danger to which the property was exposed. In addition to the perfectly helpless condition of the vessel, it must be remembered that owing to her proximity to the land, with the veering of the wind to the eastward, as deposed to, there was a certainty of her drifting to the shore and becom-

ing in all probability a total and complete wreck. Whether then the danger be immediate or remote matters not, so long as there is a reasonable probability of misfortune.—*3 H. & N. 505.*

Under such circumstances, and applying these rulings and principles, we must determine that the salvors were justified in their endeavor to save this property, and entitled to salvage or that "reward" which is earned by those who have voluntarily saved a vessel from peril of any kind occurring at sea, or earned by those who have meritoriously contributed to the safety of the property.—*Ros. Admy, p. 14.*

In determining the amount, which is wholly in the discretion of the court, the chief elements to be considered are, the extent of the peril of the object salvaged, its actual value and the nature of the services. Where no special risk is incurred by the salvors, as in this instance, the reward is allotted upon a fair remuneration for time and trouble to the owners of the salvaging vessel and to each hand engaged.—*33 L. J. Ad. The Otto Herman.*

Viewing then the condition of the derelict, her relative value, the labor and means given in salvaging, the time and labor subsequently given at the instance of these interested in taking care of her and her gear, and also having regard to the state of the weather, the comparative absence of risk or danger to the salvors, I consider we would not be justified, under the circumstances, in reducing the amount rendered at the trial.

We must now refer to the main contention of the defendant as to the application of the provisions of the Wreck and Salvage Act, and the resulting consequences to the claims of the salvors in not conforming to its terms. The Act in question was adopted by the legislature in 1880. It embodies, and in its limited character contains, such parts of the (Imperial) Merchants' Shipping Act of 1854 as were considered necessary and applicable to our requirements and circumstances. Its provisions are in no way ambiguous, and are well adapted to accomplish the end the legislature had in view, that is, to provide for the protection and safe custody and proper disposition of property that might, through or by marine casualties, be cast on our shores or brought within the limits of the colony.

It is contended by the defendant that all such property, whether or not the owners thereof be present, must be delivered up to the commissioner appointed under the Act. If this construction could be supported it would be creative of much wrong and mischief, and conflict with the well-recognised

and elementary principles governing the rights and interest of owners of property. The outcome of such a contention would be the recognition of a most arbitrary rule, which in its application would deprive an owner of his property, of which he was desirous of having the dominion, and hand it over to an official attended with large and unnecessary expense, and might be equally unjust to insurers. We must then turn to the Act and determine if its language is open to such a construction. By its sixth section it is enacted "that when any vessel is wrecked, stranded or in distress * * * the commissioner shall * * * take command of all persons present * * * for the preservation of such vessel. * * * Any person disobeying such commissioner shall incur a penalty of not less than \$200." This is followed by the significant proviso, "that nothing in this Act shall be construed to authorize the commissioner to take charge of any ship, cargo or materials contrary to the expressed wish of the master or owner thereof or of their agents."

It will be observed that this proviso expressly applies to the whole of the provisions of the Act and is not confined to the operation of this particular section; and under its terms, the owner being present, his assent would appear to be absolutely necessary to enable a commissioner to exercise his power over the wrecked property of such owner.

The defendant vigorously contended that the absolute right of the commissioner was established by and under the tenth section of the Act and its sub-sections. These direct that where any person takes possession of "wreck" within the limits of this colony * * * he shall, as soon as possible, deliver the same to the proper commissioner * * * and any person who fails to deliver the same * * * shall forfeit any claim to salvage and shall be liable to pay as a penalty double the value of such wreck and a further sum not exceeding \$400. It is urged that this language is only open to one construction and that all such property as this in question must be placed in and surrendered to the custody of the commissioner. But in applying a construction to it we must keep in mind the proviso to which reference has been made, and also ascertain from a perusal of the whole Act what the true intention of the legislature really is as conveyed in the language and terms of the statute.

It will then be found that the object or intention of the legislature, as embodied in the Act, was to prevent any fraudu-

lent concealment or making away with wrecked property, or of its improper or unlawful detention, in the hands of parties who may have got possession of it, and by making its delivery to the commissioner imperative to secure it for the owner or those having an interest in its preservation. But where the owner himself is present and the property being in the hands of salvors, who, in virtue of their alleged lien, were retaining and caring for it pending negotiations for the settlement of their claim and for delivery over to the owners, surely such a course of conduct cannot be regarded, either as against the interests of the owners or salvors, as criminal or such as should subject them, or either of them, to the application of the penal provisions of this Act. How, under such circumstances, can it be charged that the detention of the property for a day or two was unlawful and detrimental to the interests of those concerned, or done with a wrongful intent, when we have it stated of record, in a letter from the owners, that it would be a matter of convenience and accommodation to them if the plaintiffs would continue their care and charge of the vessel for some time longer. Clearly, if the contention of defendant were held good, the arrangement thus mutually entered into would also be inconsistent with the meaning of this section.

As has been observed, this section is substantially a transcript of the 450th section, and its sub-sections of the Imperial Merchants' Shipping Act of 1854—the term commissioner in our Act being substituted for that of receiver in the former—adjudications and rulings, therefore, in the courts in England on the subject of the construction and meaning of that section may appropriately be cited and rightly followed in the present instance. The case most in point on the subject is that of the *Zeta* reported in 33 L. T. R., p. 476. In that case it appeared that a barge, coal laden, was found drifting about in the Thames with no one on board * * the parties who found her * * were held not to be precluded from recovering salvage by reason of their having neglected to comply with the provisions of the section and sub-section referred to. The reasons and grounds on which that decision rests, as stated in the judgment of Sir R. Phillimore, are so apposite and conclusive on this subject as to relieve it from any further doubt or question. He states, *inter alia*, “I do not consider that the section was intended to apply to salvors who have found a derelict, and have restored it to its owners. I cannot conceive that such a construction can be put upon the Act as this, namely, that though

they have restored the vessel to her owner, which, according to the principles of maritime law, it was their duty to do, they are liable to pay, nevertheless, double the value to the owners, and, perhaps, a penalty of £100 for what is called an improper detention. This is a penal clause * * and is intended to apply to a criminal and improper detention, whereby it is sought to practice a fraud upon the Crown or the owner, but not to apply to cases of this description." This rational and just interpretation of the scope and meaning of the section by such an eminent authority, stands unquestioned. The circumstances in this case supply equally favorable premises for the application of a like interpretation.

We also find it noted in the case of the *Liffy*, 58 L. T., 351, the terms of the Act were held not to apply to a person who took possession of a stranded vessel under the belief that he was the purchaser thereof, nor were the provisions held to deprive him of his right to recover salvage.

These recent rulings and decisions quite confirm us in the determination arrived at, and are sufficiently conclusive without further references to authority on the meaning to be attached to the terms of the section quoted. On re-consideration, therefore, I see no reason for reducing the amount of the judgment, and we hold that the grounds of contention relied on by the defendant are, under the circumstances, wholly insufficient to bring the case within the penal provisions of our Wreck and Salvage Act. Consequently, the judgment entered at the trial of the case must be affirmed, but without the cost incurred on this hearing.

HON. SIR F. B. T. CARTER, C. J.:

I fully concur in the judgment which has just been delivered by my brother Justice Little, and I think the amount of salvage he has awarded is reasonable under all the circumstances detailed by him. The principle upon which alone salvage service can be founded is a rescuing of a ship and cargo from some impending danger or distress—*pr. Dr. Lushington, the Mary, 1st W. Rob., 457, &c.* I apprehend there can be no doubt that this vessel, when found at sea submerged, was, when taken charge of, in imminent danger, having been deserted by the crew and apparently abandoned, and that the services rendered were of a meritorious character, which our maritime law encourages. Several hours afterwards some of her late crew came along in

a steam-tug to tow the vessel into port; thus it appeared that the master and crew had deserted her only temporarily, without any intention of final abandonment, but with the intent to return and resume the possession, and therefore would not be considered strictly a legal derelict, but, at the time when discovered and taken charge of by the salvors, having regard to what afterwards transpired, the vessel may be described as in the condition of a quasi derelict. I need not here repeat subsequent occurrences so fully given by my brother judge.

It was strongly contended that the salvors had forfeited all claim, and, moreover, subjected themselves to penalties in not delivering up the vessel to the Receiver General—there being no Wreck Commissioner in this district—under the Wreck and Salvage Act, 1880. This is a transcript, or nearly so, of the Imperial statute. A most salutary enactment and its observance ought to be enforced in cases where applicable. The prominent feature of the Act, I take it to be, to ensure the safety of the property from the hands of wreckers, and eventual restoration to the owners, for the attainment of which object there are certain provisions. In this case the owner was known and present, and he arranged for the re-delivery of his vessel, by guaranteeing the salvage claim; and further requested that the vessel might be permitted to remain at a wharf, where she had been moored by the salvors for his convenience. I cannot conceive that, under such circumstances, the legislature ever had in contemplation the forfeiting of salvage claim and being amenable to penalties for infringement of the 1880 Act, besides burdening the owner with unnecessary charges. Before we discovered the “Zeta” decision, I and my brother judges were, I believe, of the same opinion as at present. I regard the provisions of the Act amply sufficient for all the purposes it was ever intended reasonably to embrace, and I affirm the judgment given in the first instance.

HON. MR. JUSTICE PINSENT:

This was an action for salvage services in the case of the schooner *William*, on account of damages to which ship, from collision with the *P. F.*, the action of *Whiteway vs. Power* was tried before me in the last term.

The vessel was, as I have mentioned in my judgment just delivered in that case, picked up near the site of the collision within a few hours of its occurrence. The master and crew

had been obliged to leave the *William* and go on board the *P. F.*, the master intending to return and send a tug to her rescue.

Before the tug arrived the crew of the plaintiff's schooner had possessed themselves of the *William*, and, with the assistance of a steam-launch brought her into St. John's.

The action for salvage services was tried by Mr. Justice Little without a jury, and the learned judge assessed the value of these services at \$120.

The present proceeding is one to set aside that finding on two grounds: (1.) That the amount of the judgment was excessive; (2.) That there was no right in the plaintiffs to recover, and that the action should have been dismissed by reason of the plaintiffs having violated the provisions of the local statute relating to wreck and salvage in not having delivered the *William* to the Wreck Commissioner.

Upon the first point I see no reason for departing from the general rule that this court does not undertake to interfere with the findings of the judge, to whom a case has been referred for trial, upon questions of fact and in matters of discretion, such as the award of damages.

The second point, which goes to the dismissal of the action as a matter of law, stands in a different position and calls for review.

Our local law on the subject of wreck and salvage runs very much upon the lines of the Imperial statutes, providing for the appointment and regulating the duties of receivers of wrecked property.

The main difference lies in this, that whereas *wreck* under the Merchant Shipping Act is described as including jetsam, flotsam, lagan and derelict "found in or on the shores of the sea or any tidal water," our enactment uses the expression "within three miles of the coast or shore of this colony or its dependencies."

Clearly the *William*, if she belonged to the category of *wreck* as described in these enactments, came within the provisions of our local statute, as she was found deserted by her master and crew within three miles of the shore.

If it had not been for the Acts, which give a different signification to the term "wreck" from that which it originally bore, a vessel in the position in which the *William* was when she was assisted would not come within the description.

"Wreck," irrespective of the statutes, means such goods as, after shipwreck, are cast upon the land by the sea, and left

there within some county, for they are not wrecks so long as they remain at sea in the jurisdiction of the Admiralty,—*2 Inst.*, 167.

Although a different application from this is given to the term “wreck” under the Acts in question, yet, as our Act stands, the property contemplated by its provisions must be either jetsam, flotsam, lagan or derelict. Now *jetsam* applies to goods cast into the sea when a ship is in danger of sinking; *flotsam*, to goods which float away from a ship which has sunk; *lagan* or *ligan*, to goods cast into the sea and which sink, but are attached to a buoy that they may be found again. Clearly the disabled schooner *William* was neither of these. Then was she necessarily a *derelict* within the meaning and penal operation of the Act? If this was so the position taken by the defendant would be unanswerable.

To constitute a derelict it is necessary, to use the language of Sir R. Phillimore in the case of the *Clarisse* (1 Swab.), that “there must be no *spes recuperandi*, and no *animus revertendi*”; and, after declaring that the case of the *Clarisse* was not one of derelict, that very learned Admiralty Judge adds, “the law is clearly laid down by Lord Stowell in the *Aquila*, where he said, “it is sufficient if there has been an abandonment at sea without hope of recovery; a mere quitting of the ship for the purpose of procuring assistance from the shore, or with an intention of returning to her, is not an abandonment.”

The late case of the *Zeta*, cited by our learned brother, follows this authority. Quitting possession without the intention of leaving the property to its fate, and the abandonment of the property, are two very different things.

In the case of the *William*, both the hope of recovery and the intention of returning were abundantly evident. Moreover, the owner claimed her from the salvors immediately, and throughout asserted by himself and his agents his right of property.

In regarding the numerous authorities upon this point, the distinction must be borne in mind between the use of the term “derelict” in this sense and its occasional *quasi* use in determining the amount of salvage awards.

In my opinion the provisions of the “Wreck and Salvage” Act do not apply, and were never intended to apply, to such a case as that of the *William*.

Mr. Horwood for plaintiff.

Sir W. V. Whiteway Q. C., and *G. M. Johnson* for defendant.

1892, April. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Insolvency Act—Fraudulent preference—“With a view of giving an undue preference”—Notice of insolvency by payee.

The insolvent, shortly before his insolvency, had made a large payment to a creditor. The trustee of his estate claimed to have the money refunded, on the ground that the payment constituted a fraudulent preference under the Insolvency Act.

Held—The payment did not constitute a fraudulent preference : (a.) As it did not appear that the payment was made with a view of preferring the payee over his other creditors ; (b.) The payee had no notice of, nor was he aware of the insolvency of the payor.

THIS is an action to recover \$488.90 for money had and received, alleged to have been an unlawful preferable payment under the eleventh section of cap. 20 of the Consolidated Statutes, which enacts, *inter alia*, “that every payment made in money or otherwise, and every cognovit warrant of attorney, judgment, or other security whatsoever, paid, made or given by an insolvent within two months prior to his declared insolvency, and with a view to give an undue preference to any creditor, shall be and are hereby declared to be null and void and of no effect, in case the person taking or receiving the same, or for whose benefit the same was taken or received, had notice or was aware of the insolvency, &c.”

A provision similar in principle, although not precisely in the same verbiage, is incorporated in English bankruptcy law. To the latest statute thereon I shall refer, as the principles of the decisions in the English courts are guides to us in the application of the local law.

The English Act, 1883, provides that every conveyance, &c., made, every payment made, every obligation incurred, &c., by any person unable to pay his debts as they become due, from his own money, in favor of any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking or paying the same is adjudged bankrupt on a bankruptcy petition presented within three months after the taking, making, &c., be deemed fraudulent and void as against the trustee in bankruptcy, subject, that nothing in the Act shall invalidate in case of bankruptcy, any payment by the bankrupt to any of his creditors, &c.; provided the payment, delivery, &c., takes place before the date of the receiving order, and the person (other than the debtor) to, by, or with whom the payment, transaction, &c., was made had

not, at the time of the payment or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

The insolvents had, in 1890 and previously, carried on a provision and grocery business in St. John's, and had incurred debts due to several firms, and among them to the defendants, for several months at least before the vesting order on the 3rd January, 1891. On petition for declaration they were shewn to have been hopelessly insolvent, but managed to float along receiving fresh credits, renewing notes due, and by gross frauds of a criminal nature, as subsequently came to light. In fact, their assets had been mortgaged, with the exception of a few hundred dollars, to meet liabilities of some \$11,000 or \$12,000. They had a contract with the Board of Works for supplying the public institutions with provisions, &c, which was to terminate and did so at the end of the year, for a renewal of which they tendered but did not receive. The payments, to some \$1,900, were made quarterly by the Board. In October, November and December several parties (creditors) received orders from the insolvents on the Board of Works on the amount that would be due at the end of the then current quarter. Some were accepted, others not. Among the latter was one in favor of the plaintiff, as he states, for goods given in September on a note which matured on the 20th December, for which he got an order on the 17th of the same month; presented on the 24th or 25th December; he gave them credit because of their contract.

Plaintiff further states the defendants received orders on the 9th December on a dishonored note for \$155, due 8th December, included in the same order \$333.90, falling due on 20th December, which was accepted at the Board of Works' office. It was notorious about town their credit was bad and insolvent; and, on cross-examination, their insolvency was notoriously known three months before the end of the year.

Other witnesses were examined, some of whom had orders given to their firms not accepted on presentment, but they confine the rumor of the bad credit of the insolvents to December; and it was shewn that several writs had been issued against the insolvents, commencing from July.

For the defence, Mr. John Harris, managing partner of Hearn & Co. (the defendants), deposed that they had dealings with the insolvents for three or four years, which were not of a satisfactory character. In July, 1890, he was satisfied of their sol-

vency; gave them goods in that month, which were paid by a note August 6th—\$312.82—due November 9th. Also, gave further advances in September; took two notes—one on September 5th, due 8th December; another on September 17th, due December 20th. One of the Graces convinced him they were perfectly solvent, and Mr. Goldie, manager of the Union Bank, of which both were customers, gave him in July a copy of a paper he had from Grace, which shewed a surplus of assets over his liabilities of \$8,290. The note due November 9th was paid by Grace on the 24th. When this note was dishonored, called on him and threatened legal proceedings, also of the note due December 9th; requested him not to do so, as he was endeavoring to get renewal of contract, and it might affect his credit; that he would obtain an accepted order by the Board of Works for both notes, including the one due on the 20th December. He brought the order on the 11th or 12th, which they discounted at the Union Bank, a balance of \$15 besides due on account. Dishonoring notes not an indication of insolvency; it may be that a man is hard up for cash and with a stock not realizable.

On cross-examination, he did not know the extent of insolvents' business. After Mr. Goldie's statement gave them large advances, as he believed in its truth, and from Grace's statement that he would have a surplus of \$3,000 after paying all. Know this, now, not true; they were untruthful and irregular; would not have relied on them but for Mr. Goldie's statement; the fear of losing credit induced the payment; would not give more credit when asked, not from a belief of their insolvency, but would not be humbugged; had no idea of their breaking down and not paying other creditors when he got the note.

There were no cases cited on either side, and as observed by Jessel, M. R., in *ex parte Griffith*, 23 C. D. 69, which I adopt, that he thought it far better we should in all these cases (fraudulent preferences) look to the intention of the clause in the Act, and not entangle ourselves in an inquiry as to the precise views and intentions of the parties in order to see what was the motive of the transaction and what the law was before the statute (then the 1869 Act). Our duty is to construe the words of the Act; and as Lindley, L. J., said in the same case, "not to substitute decisions under the old law for the words of the statute, but the former decisions will be useful as guides." It will be observed that there is a material difference in the verbiage of ours and the English Act, and I think it would be

advisable, in the interests of all, that our insolvency law, so far as circumstances would permit, should be made conformable to the English Act in many particulars, especially in transactions like the present, defining what is to be regarded as an act of insolvency as in bankruptcy. By the local Act there are two conditions required in a successful impeachment of the transaction: (1.) With a view to give an undue preference to any creditor; (2.) That the person taking or receiving had notice or was aware of the insolvency. As to the first point, we find from the evidence that a note of the insolvent, which fell due in November, was dishonored, but subsequently paid by the insolvents into the Union Bank. Legal proceedings were threatened of this and the bills payable in December, and when that of the 9th became due the insolvents gave an order on the Board of Works for that and the other payable on the 20th (\$480.90), fearing if legal proceedings were taken, as were threatened, it might prejudice them in getting a renewal of the Board of Works' contract and affect their credit. About this time it appears several parties were receiving like orders, which nearly exhausted the amount due at the end of the quarter on the contract. With the view of giving a preference over other creditors, *ex parte Taylor re Goldsmid*, 18 Q. B. D. meant with intent to do so, and the question was whether the payment was made with the intention of giving the creditor a preference over the other creditors; and in *ex parte Ball re Hutchinson*, 3 Times, L. R., 225, "that the effect to prefer was not enough." In the same case the bankrupt says, per Cave, J., he had to renew trade bills, and he (the Judge) was satisfied that the bankrupt knew he was insolvent. If so, the payments thereafter made were fraudulent preferences, unless special circumstances intervened; but payments made to keep a concern going during that time in the usual course of business would clearly not be a fraudulent preference. The substantial object in view must be the giving a creditor the preference.—*Ex parte Hill*, 23 C. D., 701; see *ex parte Topham*, 8 L. R., Chancy, A. C. 619.

Like orders as given defendants were given to several creditors, and when given to defendants, and legal proceedings threatened, he apparently did so not to prejudice his chance of renewal of the Board of Works' contract and not have his credit affected. I am inclined to think, having regard to all the circumstances, the intention was not to give the defendants an undue preference, although upon this a doubt may be entertained.

With regard to the second point of the defendants having notice or being aware of the insolvency, and which should have been shewn to dis-entitle them to retain the payments, I am satisfied that, unless the testimony of Harris is to be disregarded, the defendants are entitled to judgment in their favor. At the same time I think the plaintiff trustee would have been remiss in his duty if he had not caused this and like transactions of the insolvents to be investigated. And I may add that, if it were not for the strong evidence of Mr. Harris, I should have no hesitation in deciding there was, in law, undue preference in the transaction in question.

HON. MR. JUSTICE PINSENT:

The plaintiff, as trustee in insolvency, claims that as to the amount of the order received by Hearn & Co., it was a payment made by the insolvent "within two months prior to his declared insolvency, and with a view to give an undue preference to a creditor," being a person "who had notice or was aware of the insolvency," under section eleven of the chapter of the Consolidated Statutes relating to insolvency.

To sustain this case, a most tedious and exhaustive inquiry was had into every discoverable transaction of the insolvents during the last year of their existence as a firm, and as to alleged public rumors regarding their position for the latter month or two of the year 1890. It was not shewn that the defendants had any knowledge of the transactions with other people so given in evidence, or of the rumors said to be current; and, in my opinion, a vast deal of evidence was admitted at the trial before us which should have been excluded if it had been before a jury, but which, in view of the case being tried by the Judges themselves, is harmless.

I admit that this was a very fair subject for investigation, but, as I pointed out at the trial and during the arguments, it is not sufficient for the purpose of sustaining such a claim to shew that the payment chanced to be a preference or an undue preference, as compared with the less good fortune of other creditors. The payment must, on the part of the insolvents, have been "made with a view to give" such undue preference; and on the part of the creditor it must be shewn that he "had notice or was aware of the insolvency," that is, for the purposes of this chapter, that the circumstances of the debtor

were such that upon a distribution of his assets he would probably be unable to discharge all his liabilities.

In my opinion both these conditions are wanting in this case. I do not believe for a moment regarding the fact that it was the practice of J. & T. Grace to give their creditors these orders on the Board of Works, and that they expected a renewal of their contract with that institution, and that the present plaintiff and various other creditors held orders from them, that they made this payment to the defendants with a view of giving them any undue preference; and I am equally clear, after hearing the evidence of Mr. Harris, of the firm of Hearn & Co., that that firm had no such notice or knowledge as would deprive them of the right to retain the money they received; and see, in regard to these positions, such cases in connection with very similar provisions in the English bankruptcy law, as *ex parte Bolland*, 25 L. T. N. S., p. 646; *Butcher vs. Stead*, 7 H. L., 838; *Bayly vs. Ballard*, 1 Camp., 416; *Re Mills*, 58 L. T., 235, 871; *ex parte Griffith* and *ex parte Hill*, 23 Chancery Div.

Judgment should be entered for the defendants with costs.

HON. MR. JUSTICE LITTLE:

The parties having arranged for the trial of this case by the Court without a jury, it was taken up and heard in the late post-terminal sittings. The action was brought to recover \$488, alleged to have been paid preferentially by the insolvents to the defendants, within a period of two months of the declaration of insolvency of the Graces, and consequently claimed to be void under and by force of the provisions of our insolvency law sec. 11, title 25, cap. 90, of the con. stats.

It appeared of record that on the 9th day of January following, a vesting order was granted by this Court or a Judge thereof, and on the 2nd February the Graces were duly declared insolvent. The examination of the plaintiff's witnesses afforded cogent proof of the uncertain character of the insolvents' trade relations, and of their evident inability on various occasions to meet their obligations, and the desperate means resorted to by them in some instances to enable them to tide over their difficulties.

From the evidence of Mr. Harris it would appear that defendants had no notice of impending insolvency; that at the time he received the order "he did not believe the Graces were

insolvent, nor did he entertain any idea of their breaking down in their business."

From these facts thus summarily given, the Court is asked to declare that this order and payment, having been made within two months of the insolvency of the Graces, must have been given or made with the intention and view of favoring or preferring the defendants to the other creditors, and must have been received by defendants with a knowledge or notice, at the time, of Graces' insolvent circumstances, and consequently should be regarded as null and void and within the terms of the section relied on.

The language of the parts of the section immediately bearing on the case, having application to such payments, is as follows: "Every charge . . . assignment of property or effects of an insolvent, and every gift . . . of his goods or chattels, . . . and every payment made by him in money or otherwise, and every cognovit, warrant of attorney . . . or other security, paid, made or given, by any insolvent within two months prior to his declared insolvency, and *with a view to give an undue preference* to any creditor, shall be and are declared to be null and void, of no effect in case the person taking or receiving the same, or for whose benefit the same was taken, had *notice or was aware* of the insolvency."

These being the terms of the section, their application to the case of the plaintiff, as set up and supported by him in evidence, would obviously involve no great difficulty in its determination. But in view of the evidence on the part of the defence, it is necessary, in the first place, to ascertain what meaning or construction should be applied to the words of the section rendering them operative under such circumstances. It would appear from the absence of any reported judicial pronouncement of our courts on the construction of the words of this section, the question has not heretofore been raised; consequently we have no such local authority to guide us. However, on reference to English authorities and reports, we find by the 48th section of the Bankruptcy Act the same object in almost like terms and words, declared and provided for. The parts of the section material to quote are as follows:—"Every transfer, assignment, . . . payment made . . . by any person unable to pay his debts, . . . in favor of any creditor with a view of giving such creditor a preference over other creditors, shall, if the person making the same be adjudged a bankrupt, . . . within three months after such event be deemed fraudulent and void as against the trustee of such estate."

Thus, it may be seen that this enactment is pretty much on all fours with our insolvency law in this particular. The Imperial Act declares that such payments shall be deemed fraudulent; our Act, omitting the phrase, renders it necessary on the part of these impugning the *bona fides* of such payment, to shew that the creditor so preferred had notice or was aware of the then insolvency of the debtor. In like manner we find the same intention on the part of the Legislature to support an honest transaction embodied in the proviso of the Imperial Act, declaring that the section shall not affect the rights of a purchaser, payee or incumbrancer in good faith or for valuable consideration.

Such then being the close analogy between these enactments, we may, for our guidance in determining on the questions here raised, have reference to the reported adjudications and decisions of the courts in England in similar cases to the present, in which it was necessary to apply an interpretation or construction to the terms of that section of their bankruptcy laws.

One of the latest of these cases, in *re Taylor*, is reported in 35 W. R., p. 148. In that case it appeared that bonds that had been intrusted to the bankrupt Goldsmead were missing, and, being called upon to replace them, he could not do so, but assigned to Taylor certain property as security. He had also been intrusted with the sale of an annuity, misappropriated the money, and, upon being threatened with a prosecution, gave Taylor a cheque for £3000. This occurred a few days previous to the adjudication in bankruptcy. Lord Esher, M.R., in delivering his judgment, observed (*inter alia*), "It was urged that the construction of the 48th section must mean that if as a fact the debtor is unable to pay his debts at the time, and yet makes a transfer of any sum to any one, that of itself shows a fraudulent preference within the meaning of the Acts . . . And that we are not to take any of the subsidiary matters . . . into account in considering what amounted to a fraudulent intention. We are asked to say that every payment to a creditor is, as a fact, such a fraudulent preference, and practically to strike out the words 'with a view of giving such creditor a preference.' This cannot be allowed. The court must be satisfied, not merely of a 'payment,' but of a payment 'with a view to prefer.' It is said we must only consider the predominant view in the debtor's mind, but if his views are mixed which is the predominant view? . . . We cannot leave out this question of intention in considering whether or

not the debtor acted 'with a view to prefer' one creditor to others, and in doing so we must consider whether or not his predominant view was to get rid of pressure."

And Justice Lopes in the same case observes as to this section of the Act, the test of fraudulent preference is the animus of the debtor. "The mere making of a payment which is preferential is not necessarily fraudulent." The assignment of the property, as well as the payment of the cheque, were there held not to be void or fraudulent within the meaning or intention of the Act.

This doctrine of voluntary preference is we find, further pronounced on in the judgment of Lord Mansfield in the case of *Thompson v. Freeman*, 1 D. & E., T. R., in the following terms: "A bankrupt when in contemplation of his bankruptcy, cannot, by his voluntary act, favor any one creditor, but if, under threat or pressure of legal process, he give a preference, it is evidence he does not do it voluntarily."

Pressure on the part of a creditor must be taken into account, as to the dominant motive.—7 *East*, 544.

So that unless it can be made clearly apparent, and to the satisfaction of the court, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favor of a creditor.—*Ex parte Blackburn*, L. R., 12 *Eq.* 364.

In applying these governing rules and accepted dicta to the evidentiary facts and circumstances presented in this case, we are not restricted or confined to mere speculation as to what the insolvent's intention or motive may have been, nor are we obliged to draw a conclusion merely from the fact of the payment being made by them whilst encumbered by pecuniary difficulties. The proof given does not show that the insolvents made the payment from any friendly feeling existing in their business relations with the defendants, but quite the contrary. The evidence of Harris establishes the position that under pressure of the threat to attach, the arrangement was proposed by the insolvents in order to save their credit and prevent the occurrence of what might militate against their obtaining a renewal of their contract for the ensuing year with the Board of Works—thus indicating the motive by which they were actuated.

The threat of attaching their property, stock in trade, &c., immediately operated in bringing about the offer made by them. The dominant motive actuating and governing the

minds of the insolvents at the time would appear to be a desire to relieve themselves from the pressure thus brought to bear on them; and from the absence of any evidence of the existence of friendly or confidential business relations between these parties, the order in question cannot be regarded as a mere voluntary act of favor from them to the defendants. I cannot, therefore, see that the order was given, under the circumstances, purely and simply with a view to prefer the defendants to the exclusion of or in preference to others of their creditors.

Again, it must be observed that this section of our law expressly declares that such payment shall be null and void, and of no effect, in case the person to whom it was made had notice or was aware of the insolvency. Now, on this ground alone, of the absence of such notice or knowledge, the defendants would be clearly entitled to judgment in their favor.

The general character of the evidence on the part of the plaintiff would lead to certain inferences to be drawn from the acts of the Graces, which lead many to doubt and question their solvency. Beyond this there was nothing affirmatively showing any such knowledge on the part of the defendants. On the contrary, we had the clear and positive testimony of Mr. Harris that they did not believe the Graces were insolvent, nor had he any idea of their breaking down in their business. That when the credit was given they had fully satisfied themselves of the reliance to be placed on these parties in their trade and business. I am unable, under such circumstances, to conclude that the defendants had notice or were aware, at the time of receiving the amount of the order in question, that the Graces were insolvent; and, therefore, I must hold that the terms of the section relied on by the plaintiff do not apply to the payment so made to the defendants.

Sir J. S. Winter, Q C., and Mr. Horwood for plaintiff.

Hon. E. P. Morris for defendants.

1892, April. PINSENT, J.; CARTER, C. J.; LITTLE, J.

Shipping—Collision—Lights—Infringement of regulations for preventing collision at sea—Merchant Shipping Act—Beneficial owner—Registered owner—Consequential damages.

In an action for damages caused to plaintiff's schooner by colliding with the defendant's, and for consequential damages, it was proven that the defendant had no lights up at the time of the collision, which was an infringement of the regulations for preventing collisions at sea. The defendant contended that absence of lights had not misled the plaintiff, and that collision was caused by plaintiff's mismanagement. The defendant also contended that the plaintiff, being only the nominal or registered owner, he could not recover consequential damages.

Held—If there be a defect in lights, the vessel with the defect must be held to blame unless she can show the defect could not have contributed to the collision. Where a ship is placed in a position of peril by the misconduct of another ship, and her master, exercising his judgment, commits an error which contributes to the collision, he will not be held in fault.

Held—(PINSENT, J., differing.) The registered or nominal owner, not beneficially interested in the voyage or employment of the vessel, cannot recover consequential damages.

THIS case was tried before me in the last jury term of this court, and at the subsequent sittings in February application was made on behalf of the defendant to have judgment entered for him or for a new trial.

The plaintiff is registered owner of the schooner *William* by reason of his having advanced means for her being built, but the beneficial owner is one Edward Seward, of Trinity Bay, a planter and trader, by and on behalf of whom, as well as the registered owner, this action was taken.

The defendant contends that the plaintiff is not the right party in whose name an action for damages arising from a collision with his vessel should be taken, but that (if anybody) Seward should have been the plaintiff, and that, upon this ground, judgment should be entered for the defendant. No case has been cited in support of this novel position, and I believe we are all of the opinion that there is nothing in this objection, and that the action was rightly taken in the name of the registered owner.

The grounds urged for a new trial are that the verdict is contrary to the evidence, and that there was misdirection by the judge in advising the jury that by no possibility could the plaintiff be, under the circumstances, wholly to blame. If this had been the direction, it became immaterial through the jury

minds of the insolvents at the time would appear to be a desire to relieve themselves from the pressure thus brought to bear on them; and from the absence of any evidence of the existence of friendly or confidential business relations between these parties, the order in question cannot be regarded as a mere voluntary act of favor from them to the defendants. I cannot, therefore, see that the order was given, under the circumstances, purely and simply with a view to prefer the defendants to the exclusion of or in preference to others of their creditors.

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The grounds urged for a new trial are that the verdict is contrary to the evidence, and that there was misdirection by the judge in advising the jury that by no possibility could the plaintiff be, under the circumstances, wholly to blame. If this had been the direction, it became immaterial through the jury

finding that there was not only no contributory negligence on the part of the plaintiff, but that the defendant was wholly in fault. The direction, however, was not such as has been described. The court certainly expressed a strong opinion as to the absence of evidence from which could fairly be drawn the conclusion that the plaintiff was wholly to blame, and did, in summing up, say that "in all probability the want of lights on the defendant's vessel did contribute to the collision."

Now, upon the point that the verdict was contrary to the evidence, what are in a general way the facts of the case? The collision took place off Logy Bay, north of the port of St. John's, according to plaintiff's account, over a mile off shore; according to defendant's account, about quarter that distance. I think the exact spot is immaterial. The accident occurred about nine o'clock at night on the 28th July last, the weather being clear, and the wind blowing from about west. There is some difference as to the precise point from which the wind was blowing. I think the difference is immaterial to this issue.

The plaintiff's course outside the narrows was about northerly, the defendant's southerly; but the wind was free for the plaintiff, while the defendant would be hauled close to the wind. The defendant says his vessel was close-hauled; the plaintiff disputes this.

Be that as it may, it would, under ordinary circumstances, have been the plaintiff's duty to give way to the defendant, but the conditions were peculiar.

The defendant's vessel, the *P. F.*, was one which had been damaged and in distress at a southern harbor. The defendant had shortly before purchased her and set sail for St. John's; he had over-run his course, and, having found himself to the north of St. John's, was on his way back to that port. The defendant's vessel had lost her keel, she had a damaged rudder and no lights.

The plaintiff's vessel was bound from St. John's to Trinity Bay. The defendant admits that the plaintiff's vessel had her regular lights up; and it is proved on the part of the plaintiff that he had a good watch on deck. The master (one Best) was at the wheel, while the second-hand was one of the watch forward.

The case of the plaintiff is that at about quarter of a mile distant a vessel, which proved to be the defendant's schooner, was first seen from the *William*; what tack she was on they

could not then tell, nor indeed whether she was coming towards or going from them. The united speed of the two vessels was about ten knots, and before they were well aware on board the *William* on what tack the *P. F.* was, the *William* was struck by her on the starboard quarter abaft the main rigging, stem on. The *William* was so badly damaged that she sank to her deck, sails standing, and her crew had to leave her and get on board the *P. F.*; the intention of the master being to secure the services of a steam-tug with his own crew to rescue the *William*. Before the tug got to her in the morning, she was already in charge of another sailing vessel.

The plaintiff's case is that the defendant's vessel shewed so suddenly on the starboard that his vessel luffed to avoid her, and came nearer the wind; that this was the only thing he could do to keep clear of her, but that the *P. F.* kept on luffing too, and so struck the *William*, which she would not have done if she had kept her course. The plaintiff avers that throughout the time the sails of the *P. F.* were in sight the *P. F.* was on the starboard side of the *William*.

The defendant's case is that the plaintiff must have seen his ship much farther off than the plaintiff states; and that even within a quarter of a mile of each other there would have been no difficulty in the plaintiff's keeping clear; that although he (defendant) had been luffing to keep in as close as possible to the land, he had not done so after the plaintiff had sighted his vessel; that the *William* was on the port side of the *P. F.*, and if she had kept her course would have gone clear, but that she luffed up and brought herself across the bows of the *P. F.*; that until she did so she shewed her port light. The defendant contends, therefore, that the absence of lights on the *P. F.* did not mislead the *William*.

I thought that there might be something in this (although not to the extent of relieving the defendant from all responsibility, in the face of the absence of his lights and other faults), and that through inattention or mismanagement the plaintiff might possibly have contributed to the collision, and I left this position and that of the defendant's sole culpability broadly to the jury, without expressing any opinion upon the facts one way or the other; but upon this I may now say I am quite satisfied that the *William*, at and from the time she first saw the *P. F.*, was on the starboard side of the *P. F.*, although it is probable her red light may have been seen by the *P. F.* a long distance off, as she went out from the narrows of St. John's.

If the jury had found the plaintiff, as well as the defendant, in fault, they would have divided the damages between the parties; but they expressly found that the defendant was wholly in fault, and they assessed the damages in that point of view at a moderate amount, viz., \$514, instead of \$619 claimed by the plaintiff. Of this sum it is (besides the main points taken) urged on behalf of the defendant, that the plaintiff has no right to recover the loss of the ship's earnings during the time she was detained on dock and otherwise for repairs.

Upon this point I declined to leave to the jury evidence of damage in the loss of the summers's fishing voyage and other particular injury suffered by Seward, and confined their consideration to the ordinary earning value of a vessel. Upon this point the jury found a reasonable sum; and as to the plaintiff's right to sue for it, although I reserved the point, I think it goes with his right to sue at all.

Upon the allowance of this sum of \$100, my brother judges and I differ in opinion. Their lordships think that only in the name of the beneficial owner (Seward) could this amount be recovered. While I am sensible of the apparent force of some of the authorities relied upon by them, I think that they may be reconciled with the position I take on this case.

To my mind it is clear that whatever the equities may be between the registered owner and Seward, there is nothing to prevent the former from suing, particularly, as in this case, with the assent of the latter, for the recovery of the ordinary earnings or value of the use of the vessel during the detention occasioned by the collision. The plaintiff could claim possession at any time; he did intervene immediately upon the happening of the collision, and through him arrangements were made for her recovery and repair. This is not a question of previous earnings received by the mortgagor, but of damages for subsequent loss, arrested by the claim and action of the plaintiff, who sues both for himself and as trustee for Seward, with Seward's concurrence. There was no demise of the ship, such as to deprive the registered owner of the right to possession upon the happening of the collision. This I assume would be the position of the British registered owner under such circumstances anywhere, but we know that in the trade of this country, through the usage and sanction of many generations, the case of the registered owner is strengthened by the fact that vessels are held as registered owners by the creditors and suppliers of beneficial owners for the express purpose of pre-

serving to such creditors absolute right of the ship until after her earnings may have cleared her and she shall be transferred. I see no good purpose to be served in establishing a precedent for unnecessary multiplicity and circuitry of action.

The law laid down by me at the trial upon the question of collision corresponds with that provided by the statutory rules in these cases, and declared by the authorities by which these rules have been interpreted. Indeed, no exception has been taken by either side to my rulings in these respects. The statutory regulations, it will be observed, only become of importance when the risk of collision is to be avoided; and so the questions attempted to be raised in this case, of vessels hugging the land too much, or being further off the land than they need to have been on their respective voyages, has nothing to do with the question. Both ships had the right to be in any part of the sea their masters preferred, and neither could be aware or in any way concerned in the destination of the other.

The words of the statute are: "If in any case of collision, it is proved to the Court before which the case is tried, that any of the regulations for preventing collisions contained in, or made under, the Merchant Shipping Acts, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary."

In the case of the *Glamorganshire*, 13 App. cases, 462, the principle laid down is that of the *Fanny M'Carroll*, p. 455, is sustained, that where there is a breach, the presumption of culpability on the part of the vessel committing it, can only be met by proof that the disaster in question could not by any possibility be attributed to the breach.

The jury, in the present case, were perfectly right in dismissing the unreasonable contention that the collision could not by any possibility be attributed in whole, or in part, to the defendant.

In the case of the *Duke of Buccleuch*, L. R., 15, P. D., 86, Lord Esher, M. R., in delivering his judgment, observes, "I take it that that case therefore decides this, that if it can be shewn that a vessel—I will speak only of lights—has her lights not perfect according to the rule, if you can shew that there is a defect in the lights, that vessel must be held to blame, unless she can prove that the defect which existed in her lights could not by any possibility have contributed to the collision. The whole burthen of proof lies upon her."

Then his lordship observes, illustrating this position, "that may sometimes be a very easy point to decide, for if the approaching vessel is always well on the port side of another ship, and the defect which exists in her lights is only on the starboard side, it does not take a moment's consideration to shew that the defect in the green light could not by any possibility have contributed to the collision by the vessel always approaching on the port side;" and he also instances the case of the absence of a foghorn in broad sunlight.

Then his lordship proceeds to put less clear and easy cases, *e. g.*, that of a vessel approaching end on to another, with a light only defectively obscure to a vessel on the beam. Then he adds, "If at the end of the case the evidence leaves the Court in doubt whether the other ship was coming up on the beam or not, then the vessel which has its lights defective has failed to discharge the burthen of proof. She has not shewn that the defect in her light could not by any possibility have affected the collision, because if there is any doubt whether the other vessel was coming towards her nearly stem on, then there is still a doubt whether the defect in the lights may not have affected the collision."

With regard to the question of alleged mismanagement on the part of the *William* in not keeping her course, or in not giving way to the *P. F.*, by going to leeward when she had freer wind, it has to be borne in mind that it is provided by rule 23 that in obeying and construing the rules due regard shall be had to the dangers of navigation, and to any special circumstances which may render a departure from them necessary, in order to avoid immediate danger; and it was said in the case of the "*Tasmania*," 15 *Appeal, H. L.*, 227, that the master "was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger threatened;" and the authority of the *M. R.* in the *Bywell Castle*, 4 *P. D.*, 226, is approved, in which he says, "I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill we should under other circumstances;" and in the Scotch case of *Hine v. the Clyde Trustees*, it was held, following other authorities, that where a ship is placed in a position of peril by the misconduct of another ship, and her master, exercising his best judgment for the safety of his vessel, commits an error which causes or contributes to a collision, he will not be held in fault. See also upon these

points the cases of the *Englishman*, L. R., 3, P. D. 18, and *China Merchants S. N. Co. vs. Bignold*, L. R., 7, App. Cases, 512.

Under the circumstances of this case, and regarding all these authorities, I am clearly of opinion that the jury have exercised a sound judgment, and that their verdict (less the \$100 disallowed by a majority of the Court) should stand, and judgment be entered accordingly.

HON. SIR F. B. T. CARTER, C. J. :

I concur in the judgment of Mr. Justice Pinsent, before whom this case was tried, on the main issue. The law was correctly expounded to the jury, and the issues involved were sufficiently submitted to enable them to arrive at a correct conclusion upon the facts deposed. But as to the \$100 consequential damages, a question of principle has been raised. It is contended that the plaintiff, although the registered owner, was only nominally so, the vessel, at the time of the collision, not proceeding on a voyage in which he was interested, and not responsible for the expenses incidental to it, but was in the possession and under the control of another, who was the real owner, who appointed all on board engaged in the navigation, and provisioned them, and none of them was an agent or servant of the plaintiff. The title and property, by statute, belong to the person appearing on the register, and the title to freight is *prima facie* an incident of ownership, and if there was nothing in the evidence to shew that the plaintiff was not beneficially interested in the employment of the vessel at the time of the collision, I apprehend there would be no question of his right to retain the verdict of the jury, which is apparently a fairly moderate amount; the injured party is entitled to full compensation, and his right against the wrong-doer is to be placed by him in the position in which he would have been in if the collision had not happened. The jury have found for the amount to reinstate the vessel and assessed the consequential damages separately. If the party beneficially interested in the voyage or employment of the vessel had been joined in the action, this objection would not likely have been raised. As a mode of testing the plaintiff's right in this respect, I shall assume the position of the parties was reversed, and that the plaintiff's vessel was charged with having caused the collision, would he be liable for such damages in an action in *personam*

taken by the now defendant. *Prima facie* the registered owners of a ship are liable for the negligence of those in charge of her, but if the actual owner is a different person from the registered owner, or if it is shewn that the latter is not the employer of the crew or person causing the collision, the presumption is otherwise.—*Marsden on collisions*, 27, citing *Joyce v. Capel*, 8, C. & P., 370, *Hibbs v. Ross*, L. R. 1, Q. B., 534. Owners are liable at common law only when the person by whose wrongful act the collision was caused, is their agent or servant and he is acting within the scope of his employment,—per Lord Blackburn, *Sampson v. Thompson*, 3 App. Cas. 279, 293; *River Wear Commissioners*, 2 App. Cas., 743, 75. Where a ship is worked by a charterer or hirer who appoints and pays officers and crew under a charter-party, which amounts to a demise of the vessel, the owner is not liable at law for damages she may do while in the possession of the charterer.—*Fenton v. Dublin Steam Packet Co.*, 8 Add. & Ell., 835. If this be the law, of which there can be no doubt, why should not the same principle have operation when the converse of the position of the parties exists, as in this case; and is not one the correlative of the other? I must say that I regret in this case being constrained by law to arrive at this opinion, but I am not justified in departing from what I consider to be a clear principle, and setting up an unauthorized precedent, because of inconvenience and that ulterior proceedings may be required when the objection is insisted upon. There were no cases cited on either side.

Mr. Justice Little concurs in this judgment.

Mr. Johnson for plaintiff.

Sir J. S. Winter, Q. C., for defendant.

1892, *April*. HON. MR. JUSTICE PINSENT, D. C. L.

Partnership—Dissolution of—Bill for account—Joint proprietors.

The plaintiff entered into an alleged mining co-partnership with the defendant for the purposes of mineral explorations, and agreed to contribute a sum towards the cost of the undertaking, a portion of which he paid. Eventually the enterprise was abandoned, and the titles to property allowed to lapse and become forfeited. The plaintiff filed a bill for an account of the partnership and prayed for a decree for the dissolution of the same. It appeared that the plaintiff had given notice to the defendant of the dissolution of the alleged partnership. The defendant denied any partnership, and contended that the plaintiff was a co-proprietor in the mining properties.

Held—Where there is no fixed term for the duration of a partnership any partner may retire from it at any time by express notice to his co-partners. The partnership was long ago dissolved by the expiry of the business and the extinction of the rights of property. Decree and account refused.

THIS is a proceeding in which the plaintiff seeks the dissolution of an alleged co-partnership between him and the defendant, and prays for an account of the application of certain monies and of the results of their joint speculations.

The plaintiff and the defendant both resided in Brigus, Conception Bay, at a time when much interest had been excited there by the discovery of gold-bearing quartz in the neighborhood. The defendant was associated with several persons, resident in Brigus and St. John's, in exploring for gold and in government mining licenses, either acquired or prospective.

In the spring of 1885, the defendant being thus interested with two others in tracts situate at Port-de-Grave and Burnt Head, proposed to the plaintiff, who was at that time on terms of intimate friendship with the defendant, to become interested with him in these mining locations.

What the nature of that interest was is the main question in this suit. The plaintiff insists that by agreement with the defendant he became, in May, 1885, interested with him as a partner in his (the defendant's) shares in the Port-de-Grave and Burnt Head mining properties; and that, for the purpose of their development, he agreed to contribute, if necessary, £100, to be paid to the defendant. That he did pay to the defendant on this account two sums of £25 and £50, but not the remaining £25, and of the expenditure of the amounts so paid, and of the results of the speculation generally, he requires an account; and he demands a decree for the dissolution of partnership. It will be observed that the plaintiff's claim is solely

against the defendant as a sleeping co-partner with him in a one-third share of an adventure in which the defendant was associated with two others in equal proportions in the entire properties.

The defendant denies that there was any such co-partnership between him and the plaintiff. His contention is, that desiring to give the plaintiff, who naturally felt a deep interest in the welfare of the neighborhood, a chance of making a good thing, he offered to sell to him, as proprietor and not as partner, half his (defendant's) interest in the licenses in question for the sum of £100. That by these means, too, he would be enabled to raise an equal sum with the persons he was already associated with in testing the properties, in the cost of doing which the plaintiff was to incur no liability. He adds that the plaintiff is indebted to him for the balance of £25, which, notwithstanding many demands, he has never paid.

These different versions of this transaction are told at large in the sworn testimony of the parties. Unfortunately there was no witness to their negotiations, and their agreement was not reduced to writing, and there is little or nothing in the way of collateral circumstances to aid one in arriving at a satisfactory conclusion.

With regard to the intrinsic force of the evidence of the parties, it was forcibly argued by Mr. Emerson, for the defendant, that upon what proved to be an entirely inaccurate version on the part of the plaintiff, of the time and circumstances attending the payment of the second instalment of £50, making, for instance, a difference of a whole year in the time, the plaintiff had reared a superstructure of error, and that his memory had so failed him as to make his narrative of the circumstances worthless as against that of the defendant. The learned counsel also pointed to a letter of the plaintiff's solicitor, dated July 31, 1888, in which he writes: "I am directed by the Very Rev. Father Walsh, of Brigus, to give you notice that *if it be a fact* that any partnership exists as between you and him in relation to your share or interest in any gold mining license in which you are interested with Messrs. John Bartlett and D. J. Henderson, or other person or persons whomsoever, or in any mining or other transactions whatsoever, the same is hereby dissolved," &c., &c.

Moreover, it is shewn that the plaintiff, at one time, claimed to be a general partner with the defendant and his associates in the entire property, and yet apparently without regarding

himself as liable to contribute to the general expenses beyond £100. The utter uncertainty, in the terms and nature of the whole of this transaction, is evident from the plaintiff's own case.

On the other hand, the defendant points to memoranda made by him in a diary from time to time in support of his history of his business transactions with the plaintiff; and, with regard to the original agreement, this entry, "May 15, 1885. Called on Rev. E. F. Walsh, who accepted my offer of half my interest in the Burnt Head and Port-de-Grave licenses for £100, to be paid as I needed it."

Now this entry itself, although it favours the idea of a sale, would not be absolutely inconsistent with the existence of a partnership as between the plaintiff and the defendant, with a limited liability on the part of the plaintiff, and, as pointed out by Mr. Kent, we find the defendant, in an order which he drew upon the plaintiff for the unpaid balance of £25, describing it as "amount due me on account of the gold partnership." The defendant endeavours to explain this by saying that he there used this expression in the sense of "conjoint interest with me in my share of the licenses."

I may say, without hesitation, that notwithstanding the serious inconsistencies and contradictions in their evidence between the parties to this suit, there is no ground for imputing intentional untruth or want of integrity to either of these respectable gentlemen. Their conflicts and their divergencies are to be accounted for, through false impressions and confusion as to facts, defective recollection, the bias engendered by strong personal feeling, and by the extremely loose and indefinite manner in which they conducted their business with each other.

It appears that after the date of the agreement, whatever was intended by it, mining operations by way of blasting, shaft-sinking, testing and crushing, actually proceeded for some time. A large amount of money was in this way expended, principally by the Avalon Gold Mining Company, (in which the defendant was interested with many others in other properties, also in the vicinity of Brigus), and to a smaller extent by the plaintiff's company.

These operations appear to have been carried on jointly by the companies with a common object, and it is difficult to say at this time what proportion was borne by the plaintiff's company, but clearly it was comparatively small. It is sufficient to

ernment of the offer of the claimants, contained in their letter of the 27th July, 1888, "to do the necessary dredging at eighty cents per cubic yard, the material to be measured in the scows." When the claimants considered the work completed they furnished their account therefor at \$42,220, being for 52,775 cubic yards material, in accordance, as alleged, with the letters of the dates aforesaid. The government, regarding the claim excessive, and having declined to pay it, arbitration was agreed upon; and both parties, on the 25th March, 1891, submitted and referred the claim and all matters in connection therewith, to the award of the Hon. Alex. M. Mackay and Alex. Marshall, Esq., and of such third person as the said arbitrators should appoint by writing, thereon endorsed, whose award, or of any two of them, should be final and binding on the parties, and that they should, and would perform, fulfil and keep the award as therein provided. The arbitrators' fees, &c., were to be in the discretion of the arbitrators, or any two of them, who should direct and award by whom, and to whom, and in what manner, the same should be paid. It was also provided the submission and award should be made a rule of Court. On the 30th June the two named arbitrators appointed, as the third, Daniel W. Prowse, Esq., a Judge of the Central District Court. It would appear, that from the 9th July to the 22nd September, these arbitrators had nineteen sittings, at which they were all present, and examined several witnesses, whose evidence was recorded by an efficient reporter, selected by both, in a book referred to as containing the official evidence, and produced in Court. The arbitrators, having taken time for consideration, two of them, Messrs. Marshall and Prowse, on the 16th Oct., 1891, awarded Messrs. Simpson, the claimants, the sum of \$20,000 currency in full for the said dredging, and that each of the parties should pay and bear their own costs of the arbitration. That the government pay the expenses and fees—\$250 each—\$750; Lieut. Warden's fees, and fee to Secretary Flannery, \$80, and that the claimants repay the government one half (455.)

I do not think it at all a matter of surprise, that in such a transaction, involving so large an amount, a dispute should have arisen, when we consider the exceedingly loose character of the arrangement for the dredging. As usual in such cases, when the bill was presented, the effect of the absence of definite stipulations became apparent enough, and, when their differences could not be reconciled, there was no alternative mode of ad-

justment than to institute legal proceedings or submit to arbitration. In this, the wiser course, in the interest of all, was the selection of gentlemen of integrity and experience to adjust the questions in dispute.

We have seen that the commission to them was without restriction, and they were thus, by the voluntary act of these parties, constituted the judges both of the law and the fact as regards the "claim for the dredging and all matters in connection therewith." We are not sitting here as a court of review of the evidence, nor as to whether we should or might have arrived at a different conclusion, for the courts will not allow the merits of the case to be gone into, even though the judgment arrived at be erroneous, where there is no allegation of excess in jurisdiction, or that conferred was not exercised, and where the award is good on the face of it. Russel on awards and cases, cited p. 678. To so large an extent is this principle recognized that even the case of *Hall v. Hinds, 2, M. & G., 847*, cited by Mr. Johnson, where two of three arbitrators made the gross and culpable mistake of subtracting from, instead of adding to, an ascertained sum, has not been wholly approved of, but at any rate the oath of the arbitrator of his having made the mistake would be required before either referring it back or setting aside where the mistake did not appear on the face of the award.—*Russell, 314, Dinn vs. Blake, L. R., 10 C. P. 388*.

But if it be shewn that there has been such unfair conduct of the arbitrator, as in the opinion of the court would disentitle him, occupying for a time a judicial position, to have his adjudication sustained, or that in the course of the proceeding he was not acting in a manner deserving of confidence being reposed in him, the award would be set aside or his authority revoked. In this matter Mr. Johnson contended there had been partiality and gross misconduct manifested by two of the arbitrators, Messrs. Marshall and Prowse, and especially by the latter, in particular instances set out in his affidavit, on which his motion is based to set aside, in that he (Prowse) procured his nomination as third arbitrator in soliciting such appointment from the other arbitrators or one of them. There is no evidence whatever to sustain this charge. Some time elapsed after the submission signed before he was appointed, and he was well known to both arbitrators. And equally groundless is his alleged conferences improperly with counsel for the Government on questions in dispute; he is also charged with having gone asleep during part of the argument of the claim-

ants' counsel; this he did, as explained in the affidavit, for a short time, and when awakened apologized, and the part supposed to have been not heard was repeated, as the argument was in writing, occupying several hours in delivery, and afterwards deposited for consideration; the interruption was temporary only; his conduct is also impugned in having spoken to a witness who had testified, about the correction in one particular of his evidence; but this is satisfactorily explained as the mistake of the witness was discovered from the evidence of one of the claimants on whose behalf he was produced. Both arbitrators are charged with having wilfully and improperly rejected the evidence of Simpson and Maher; it appears the first had already been examined upon the same points, viz., dredging at the hulk bank, which was included in the award, and the evidence of others with regard to it did not in any way affect the amount awarded as is deposed to by Mr. Marshall. Maher was examined, but soundings of his were not regarded as admissible from the time at which made. Then, on the suggestion of the claimant's arbitrator, it was agreed upon by all the arbitrators that an independent survey be taken, and that application be made to obtain an experienced person from one of Her Majesty's ships in port to make a survey over the area with a view of testing the accuracy of the plans. Lieutenant Warden, of H. M. S. *Emerald*, was selected for this purpose, with specific directions from the arbitrators, Mr. Simpson being present, and the report of the lieutenant was under consideration some time before the award was made and was acted upon. While it may be correctly stated that an arbitrator is not at liberty to follow any arbitrary principle of his own, but is bound by the same rules of evidence as govern the Superior Courts, yet, if intending to decide rightly, he comes to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy or propriety of allowing proofs of particular facts it is now settled law that the court will not review his decision or set aside the award for mistake,—*Attorney General vs. Davison*, 1 *McLel Y*, 160; *Hagger vs. Baker*, 14 *M. & W.* 9, &c., *Russell* 6, *Ed.* 207. If the arbitrator decline to receive, or if he reject evidence legally admissible, the proper course is to apply to the court for direction or for the revocation of his authority; a notable instance of which is the case of *East and West India Dock Company vs. Kirk and Randall*, 12 *App. Cas.*, 738, where it was held by the House of Lords, reversing the decision of the Court of Appeal

and the Divisional Court, that the Court had power to give leave to revoke the submission where it appeared that the arbitrator was going wrong in point of law or even in a matter within his jurisdiction, and it was referred back to the arbitrator with special directions. We cannot fail to recognize the indefatigable exertions of Mr. Johnson throughout on behalf of his clients, and it may be assumed that if anything transpired of a serious character, which he regarded as calculated to prejudice their interests, he would promptly have applied to the Court, instead of continuing to advocate before the arbitrators with apparent confidence in their arbitrament. When the evidence had been exhausted and counsel patiently heard, each arbitrator took time to prepare an estimate of the amount to which he considered the claimants had shown themselves entitled, indicative of the pains bestowed by them; and, after discussion and consideration, two of the arbitrators coincided in opinion and awarded accordingly. And after all, if the exposition of the facts and circumstances contained in the very explanatory affidavit of Mr. Marshall be correct, the difference between them was not so great as would appear on a mere cursory glance.

There can be no question of the competency of the arbitrators, and in these proceedings nothing has been shewn to impeach the integrity of any of them. I am, therefore, of opinion that unless we undertake to reverse the decisions and principles recognized by the courts in arbitration matters, this award must stand. The arbitrators had, as we have seen, full discretion over the costs and expenses, and we are not at liberty to disturb their allocation.

Mr. Justice PINSENT and Mr. Justice LITTLE each expressed concurrence.

Mr. Johnson and Mr. Kent, Q. C., for claimants.

Hon. Mr. Morris for government.

1892, *May*. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Master and servant—Sealing agreement—Shareman—Partnership—Participation of crew in proceeds of seals taken on Sunday in the capture of which they refused to join.

Sealers contracted to serve the owners of a sealing ship as their crew, and for remuneration were to receive one-third of the catch. Thirty-five of their number declined to obey the orders of the captain "to kill seals on Sundays." A considerable quantity of seals were taken on these days. The owner of the ship refused any part of the proceeds of the seals taken on Sunday to those who did not participate in the capture of the same, but allowed a sum as labor for the stowing of the same on the following days. In an action those of the crew who had declined to work claimed to share in the voyage equally with the crew who had worked on Sunday.

Held—The crew were only entitled to share in the proceeds of the seals in the capture of which they had participated. There is no law which relieves sealers from going on the ice because of the sanctity of the Sabbath, or justify their refusal when so ordered.

THIS is an appeal from the Central District Court on a special case agreed upon between the parties with the assent of Judge Prowse, before whom the hearing of the case was had. The question submitted is "whether his judgment in favor of the defendants is correct in law, on the claim of the plaintiff to recover \$16.80 for his share of certain seals taken by 132 of the crew of the s. s. *Nimrod* when prosecuting the seal fishery this season, 1892, on Sundays the 13th and 27th of March last. It is admitted that on the days named the master (Bartlett) ordered all the crew on the ice, which order the plaintiff and thirty-four others refused to obey; that seals to the number of about 3,000 were taken and secured by the work and labor of the remainder of the crew, 132 men; the exact amount has been agreed upon, after making a liberal allowance to the plaintiff and the others in making it up. It is also agreed upon that the decision of this Court is to be binding on the parties interested."

The usual agreement was entered into, in which, *inter alia*, it is provided that "the crew shall exert themselves for the good of the voyage, and shall at all times be obedient to the lawful commands of the master at sea, on shore, or on the ice; and should any man neglect or be found incompetent for the due performance of his duty in any respect, he shall only be entitled to such share of the proceeds of the voyage as the master may deem fit to apportion him;" also, "if any of the crew refuse to obey the lawful commands of the master, he

shall not be entitled to claim any share of the season's seals or any other compensation;" and "being fully and faithfully performed without hindrance or neglect, each man is to receive his share of the value of one-third of the seals brought in and delivered in this port (St. John's), being the catch of the said crew."

Counsel for the plaintiff contended there was a partnership among all interested in the adventure, and, if so, equality between them, and not the relation of employer and seamen. In whaling voyages closely resembling this, where the sailors are usually paid a certain proportion of the oil obtained, it has been held they were not partners, either with each other or with their employers.—*Lindley on Partnership*, p. 5; and the provisions of the agreement clearly indicate the subordinate position of the crew to the master, as much so as ordinary seamen on a voyage at a stipulated rate of wages. Stress was also laid on the terms of the compensation clause as regards the one-third value delivered of the catch of the crew. This is unquestioned, if the service were fully and faithfully performed, and that there was no refusal to obey the lawful commands of the master; but it must not be forgotten the seals in question were taken by only a portion of the crew after the refusal of the plaintiff and others to go on the ice and assist. It is admitted there was a refusal to obey the master's order on the Sundays mentioned, but that they were not then under obligation to proceed on the ice and assist because of the sanctity of the day, and it was not contemplated by their agreement they should do so in violation of their consciences. For this position no statute or other law has been shown to have existence, nor any usage or practice in the prosecution of the seal fishery which should be regarded as incorporated with their agreement, although not expressed, and there is no reference to the subject in chapter 109 of the con. stats. regulating agreements with sealers and others. Several Acts have been passed by the Imperial Parliament from the time of Charles the 1st for the better observance of the Lord's Day on Sunday, prohibiting certain classes from exercising their ordinary callings and employments, (works of necessity and charity excepted), but none of these have application to crews or persons serving on board ships, and we should not expect to find any when we consider the nature of such service. A commentator, who has recently published on the peculiarity of these enactments, observes, "By 29th Charles 2nd, c. 7, *work* in general is expressly

forbidden, including the use of any boat or barge. The result is that a cricket match on Sunday, which would be the scandal of a county, remains perfectly legal, while a simple promenade *sur l'eau* after church, which need imply neither desecration nor disregard of the day, exposes every one of the party to summary conviction with fine, and imprisonment in default of payment."—*Wigram's Justice's Note Book*.

We are aware the fitting out for the seal fishery involves a large outlay, the voyage occupies a short period, and to be successful in so precarious an enterprise, attended with so many vicissitudes, demands the availing of every moment of time by those engaged, as well for employer as themselves; and the master, in this case, has testified that if the seals were not captured on the days in question, they could not have been had on the day following. Mr. Browning argued they would have been there on the Monday, but from the constant changes of the wind and ice experience has proved otherwise, besides the direct testimony of the master. I suppose the proverbial *thereabouts* would have application. I can quite regard the conscientious convictions of a man in respect to Sunday labouring, but I fail to appreciate the elasticity of conscience, if I may so express it, that would prompt him to claim sharing in the fruits of the toils of others with whom he refused to co-operate, and that too on the ground of alleged desecration; and moreover, to do so must have a depressing effect on those who did labour in the honest expectation of reward in so hazardous an undertaking. The obligations of the contract are mutual in rendering obedience on the one side, and making compensation on the other, and this latter cannot fairly be claimed when the other has not been observed. The master in this case has so far regarded the action of these thirty-five men as not to have attempted to force their consciences in labouring on the ice on Sundays, he made no deduction from the value of their labours, and has, as arranged, made them liberal allowances for any work they bestowed about the seals in question. Apart from these they have not been deprived of any part of their full third of the catch delivered.

I am of opinion this appeal should be dismissed without costs.

HON. MR. JUSTICE LITTLE:

IN this appeal we are asked to review and reverse a judgment rendered against the appellant in the Central District

Court, in a test action brought therein by the appellant as one of the sealing crew of the steamer *Nimrod*, for the recovery of sixteen dollars and eight cents, being the value of his alleged share in a certain number of seals taken by the remainder of the crew on two Sundays, during the prosecution of the voyage, and sold and delivered to the defendants, the owners of the *Nimrod*.

It appears that an agreement, in the ordinary form used on such occasions, was, on the fifth day of March last, entered into by 165 men as the crew of the steamer *Nimrod*, and Henry Bartlett, the master thereof, for the prosecution of the seal-fishery. By this agreement it was stipulated "that the crew shall exert themselves for the good of the voyage, and shall at all times during the continuance thereof be obedient to the lawful commands of the master at sea, on shore, or on the ice, and shall assist in trimming coal whenever required; and should any man neglect, or be found incompetent for the due performance of his duty in any respect, he shall only be entitled to such share of the proceeds of the voyage as the master may deem fit to apportion him."

Out of this agreement and the conduct of the parties during the voyage then prosecuted the action arose; and the material facts relied on were not disputed by counsel and are admitted on the record. The exceptions to the judgment are confined to questions of law, novel in their character, but involving no very great difficulty in their determination, and will presently be particularly discussed.

It is admitted that on two Sundays, that is, on the 13th and 27th March last, there were large numbers of seals in the immediate vicinity of the steamer, and the master, as usual on such occasions, ordered the crew to go out on the ice to capture and secure as many as they could in the interests of all concerned in the voyage. As a matter of course, and for obvious reasons, prompt, active and unquestioning obedience is called for at such a time, and expeditiously rendered on the part of the crew. But, on the occasions named, the appellant and thirty-four others refused to obey the order of the master, alleging as a reason or justification for such disobedience that from conscientious motives they could not and would not engage in any work or labour on Sundays. They consequently stayed and rested on board, and on both occasions 132 men, comprising the remainder of the crew, obeyed the order and succeeded in capturing and securing over 3,000 of these seals.

It was further admitted at the argument that the appellant had consistently declined taking any active part in working about the navigation of the ship on these days, and that on the Mondays succeeding these two days he, as usual, actively assisted in getting on board and stowing away these Sunday seals.

At the termination of the voyage, and on the settlement of accounts, the appellant and his thirty-four associates, on ascertaining that they were not credited with a full share equally with the 132 other members of the crew in the proceeds of the seals so taken on these Sundays, objected to the settlement and claimed an equal participation in the whole proceeds of the one-third part of the voyage under their agreement. Whilst they endeavoured to enforce this claim by these proceedings at law, they admit, as appears by record, that a liberal allowance has been made to them by Captain Bartlett from the proceeds of the seals taken on the Sundays, ample in amount to compensate for any labor given by them in preparing the hold of the steamer for these seals and assisting in stowing them away.

In the argument on the hearing of the appeal it was contended, in support of the claim, that the voyage was a partnership adventure, and that all of the crew were entitled to participate equally in the proceeds of their share of the voyage, and that they could not be regarded as standing in the position of master and servants. Now, the very nature of the agreement, its plain meaning and effect, ought to be sufficient to determine this question of alleged partnership. The parties under it do not stand in the relations of principals, but clearly in that of employer and employed. On its face it is an agreement of hiring and service, devoid of any personal liability on the part of the crew for debts and liabilities that must necessarily be incurred in preparation for, or in the prosecution of the voyage. The agreement provides the crew shall come into *service* on a certain day, and continue to prosecute the fishery for a trip or trips, until such time as the master thinks fit to abandon the same—certainly indicating a position of employer and employed. They were, it is true, entitled to participate equally in one-third part of the voyage, subject to certain charges, but this share must be regarded as an apportionment made in lieu of wages. Where such contractual relations exist it has been settled by courts of law that a partnership is not thereby created. For instance, in the case of *Wilkinson vs.*

Fraser, 4 Eqp., p. 182, where a seaman sued for his share of oil as one of the crew of a whaler, it was objected he was a partner and could not sue at law. Lord Avonley, C. J., held that the share was in lieu of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, and that he should not consider him as a partner, but as entitled to wages to the extent of his proportion in the produce of the voyage. Furthermore, the question is placed beyond reasonable doubt by our legislative enactments governing the relations between masters and servants, or seamen engaged in the prosecution of our fisheries. This contention then, in support of the appellant's claim, must be regarded as untenable.

Now, as to the second ground advanced on behalf of the appellant in support of the claim to share in the proceeds of the work accomplished by the rest of the crew on the Sundays, it is not surprising counsel was unable to cite any reported case of authority bearing on the case or fitting in with its peculiar circumstance.

It may be observed that in England, when the State entirely assumed the responsibility of enforcing the observance of the Sunday, a series of statutes followed, their primal objects appearing to be to enforce and secure attendance at places of public worship on that day, to prohibit and make penal working or labouring and following certain trades or callings, and to prohibit meetings of persons for sport or unlawful exercises and pastimes on Sundays.

A minute or detailed reference to this legislation cannot be of any practical use in determining the contentions in this case; but it may be pertinent to observe on the intention pervading some of the statutes, and to mark the exemptions and exceptions they provided for. We find these exemptions extend to the farmer in harvest time; to those engaged in works connected with perishable materials; to pursuits or labours where time was all important, as in fishing and to works of necessity. For instance, the statute of the 5 and 6 Ed. VI., directing the keeping of all Sundays as holydays, expressly exempts husbandmen, labourers, *fishermen*, &c., from its operations. We also have that which is regarded as the most comprehensive Act of all enactments on the subject, and which still continues in force in England—the 29 C., 2 C. 7—commonly known as the "Sunday Act."

It may here be observed that it was the manifest desire of courts of justice to advance the object of the legislature, and

"that these enactments should receive a liberal construction, being for the better observance of the Lord's day." A few references to cases, by way of illustration, will show the meaning attached to this the most important of these enactments.

The words of this statute are that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work, of their ordinary callings, upon the Lord's day." One would say that such language was sufficiently general and comprehensive to interdict every description of labour on this day; but in the case (*7 B. & C., p. 601.*) of the making of contracts of service on this day between a farmer and his labourer, the contracts were held valid; and in the course of his judgment delivered in the case, Bayly, J., observed "that if the legislature had intended to embrace every description of persons, every species of business, it would not have been necessary to make an enumeration of several classes of persons exercising particular descriptions of labour or business. It would have been sufficient to say that no person whatsoever should do any work or business on the Lord's day. If it had been intended to be general, the legislature would have used general words. If the true construction of the Act be that every description of business is prohibited, all contracts whatever made on Sunday would be void, but that is not so." He further observes that religion and piety do not require that the whole day should be devoted to the performance of religious exercises. To a reasonable degree a man may, on that day, consider his own condition and that of his neighbour, and may do acts beneficial to himself and calculated to promote the comfort of his neighbour.

In further interpretation of the language of this Act there is the case of *Lundman vs. Bleach, 7 B. & C.*, in which it was held that the general words in the statute, "other persons whatsoever" following the particular words of designation, applied only to persons *ejusdem generis* with these described in the Act, consequently the farmer, as instanced, stage-coachman, attorneys and solicitors, &c., were not within its operation.

Certainly, then, no analogy can be found to exist between these cases named in the statutes, and a case so alien in every respect to them, as that of parties engaged on the high seas in the prosecution of such an industry as that in question. The Act, although still in force in England, cannot be regarded as at all applicable here; and in other statutes we find that fishermen are expressly exempted.

We next turn to the common law, and discover no power or authority for enforcing this laudable observance; it is held even that it is not unlawful by the common law to trade or labour on Sunday, and that a contract made on that day is not void.

Our statute law is silent in relation to the general observance of the Sunday. Although it contains directions upon the agreements and relations between masters and sealers, and others engaged in the fisheries, there is nothing laid down or prescribed as to the manner in which the day is to be observed by them during the prosecution of their respective industries. There is some particular legislation prohibiting certain acts, such as the hauling of bait fishes, the carrying of fire-arms in violation of our game-laws, and the selling of spirituous liquors on Sundays.

It may also be observed that no custom has been shown to exist that might support the position assumed by the appellant. This, then, being the condition in which he finds himself under our laws, it results that he and his companions must be governed in their conduct by the terms of their engagement.

From his apparently long experience as a sealer, and his knowledge of the nature of the voyage, of its uncertainties and exigencies, he must have known that, being subject to the lawful commands of the master, he might at any time, on any day, when in the seals, be obliged to assist in taking them; and knew well that an opportunity lost to secure them might not be regained. This was made apparent on the occasions when these seals were taken. The evidence of the master shews that if they had not been secured on the Sundays, they would not have been there on the following Mondays, owing to the change that had taken place in the wind and weather, and the condition of the ice. If it were not for the ready obedience made to the orders given, and the exertions of the 132 men of the crew, who appear to have felt "that the Sabbath law should give way to the needs of man," this valuable property would not have been secured, but would have been totally lost to all interested in the undertaking.

The desire to pay respect to the day was most laudable on the part of the appellant and those acting with him; but their disobedience to the master's orders, and their refusal to co-operate with the rest of the crew under existing circumstances, would tend to affect the discipline and that mutual trust and confidence that should prevail among the crew on the voyage they were prosecuting. The demand or claim they now make

to a participation in the proceeds of the work done on the Sundays renders the sincerity and consistency of their conduct very questionable indeed. They admittedly have been fairly dealt with, and more than fully remunerated for their labours on the following Mondays about the seals. The master, under the terms of the agreement, and in consequence of their disobedience to his lawful orders, might have acted differently towards them.

I regard the claim, sued for in the District Court, wholly unsupported by any shadow of right, and see no reason for disturbing the judgment rendered in that court against the appellant.

This appeal should be dismissed, but without costs.

HON. MR. JUSTICE PINSENT:

This is an appeal from a judgment of the Central District Court, in an action brought there by the plaintiff to recover from the defendants the sum of \$16.80, representing the difference between the amount paid to him (similarly to thirty-four other men) as his share in the voyage of the sealing steamer *Nimrod*, and the larger sum paid to the crew in general. The full share per man was 81.92.

The reason of this difference being made between the plaintiff with others and the rest of the crew, is that they declined to work at seal-killing on Sundays.

There had been during the voyage two Sundays, upon which between 4,000 and 5,000 seals were taken without the aid of the plaintiff and his thirty-four colleagues.

Notwithstanding this fact, these persons, who form a small minority of the crew, claim to share in the proceeds of the entire voyage equally with the men who did work on these Sundays.

The claim will, I think, be regarded with astonishment by all reasonable men, no matter what views they may hold with regard to the morality or propriety of seal-killing on Sundays.

One would be disposed to hold in high respect the conscientious scruples of men who, on principle, decline to engage in the prosecution of profitable work on Sunday, and who are content to suffer the loss; when, however, they insist upon participating in the wages of this iniquity, the result of the labors of others who have no such conscientious objections, one may be pardoned for holding their claim in light esteem.

These considerations do not affect the strict legal rights of the plaintiff, beyond the fact, that as a rule the law will be found to be consistent with righteous dealing; and the question with us is simply what is the law governing the contract entered into between the owner, master and crew of the sealing steamer *Nimrod*.

The agreement, in a general way, is to the usual effect, that the men contract to serve the owners (the defendants in this case) as members of the sealing crew of their ship, and are, upon the faithful performance of their duties, entitled to receive as remuneration or wages their respective shares in one-third of the proceeds of the general catch.

The adventure is one of much speculative risk, involving a very large expenditure on the part of the outfitters, while calling for enterprise and vigilant activity in the pursuit of their calling on the part of the crew employed in the prosecution of the voyage.

In this case the following clause forms part of the agreement:—" *They (the crew) shall exert themselves for the good of the voyage, and shall at all times, during the continuance thereof, be obedient to the lawful commands of the master, at sea, on shore, and on the ice;*" and "*should any man neglect or be found incompetent for the due performance of his duty in any respect, he shall be only entitled to such share of the proceeds of the voyage as the master of the said vessel may deem fit to apportion him.*"

It is plain from these stipulations, that if the orders given to the crew to take seals on Sunday were lawful commands, the plaintiff and others who disobeyed them, subject themselves to the exercise of the discretion of the master in apportioning to them a reduced interest or share in the entire catch of seals.

If they be unlawful commands, or if they be of such a character that they may be lawfully disregarded, the question will present itself whether, and if so, how far, the plaintiff is entitled to lay claim to the product of the labor of others who have submitted to these orders.

I may premise, that no such offence is known to the common law as that which is termed *Sabbath-breaking*. Except as arising out of the religious discipline enjoined by the canon law, and the legal restraints imposed by statute, no distinction is drawn between men's conduct on the Sunday and their conduct on any other day of the week.

The earliest statutory recognition of Sunday interdicted trade, but encouraged national sports on that day, after religious observances should have been attended to.

After the Reformation the observance of Sunday was more strictly enforced, and the statutes of Edward VI. and Elizabeth enforced attendance at the parish church, or some usual place of common prayer, under pain of ecclesiastical censure; imposing at one time a fine of twelve pence for each offence of wilful neglect; and these acts provided for the keeping of all Sundays as holy days, with an exception in favor of husbandmen, labourers, fishermen, and other persons in harvest or times of necessity.

Under the commonwealth, ordinances for observing the sanctity of the Lord's day became yet more stringent, and prohibited travelling as well as "vainly and profanely walking" (which includes talking) on that day; but in face of this there are instances of the sitting of Parliament and even of Colonial legislatures on Sunday.

When we come down to the reign of the first Scotch King of England, James I., we find that it was allowed to all those conforming to the established religion to exercise themselves after service on Sunday in dancing, archery, the setting up of May-poles, and other amusements; bear and bull baiting and some other pastimes being prohibited.

So much for the social aspect of the matter. And now, with regard particularly to the commercial and industrial position there is, as I have remarked, nothing at common law to render void a contract made on Sunday, or to make Sunday trading or labour unlawful, and we have to discover in special ordinances and statutes the introduction of any law distinguishing between the first and other days of the week.

Thus, we find as far back as the time of King Athelstan, all merchandize was forbidden on the Lord's day; and in the reign of Henry VI. the holding of fairs or markets was prohibited on all Sundays, except the four Sundays in harvest. By the Act 29 Car. II., C. 7, more comprehensive ordinances were made for the observance of the Sundays, and it was provided that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling, upon the Lord's day (works of necessity and charity only excepted)," and no wares or merchandize, &c., were to be exposed for sale on that day, and no person was to use or travel on the Sunday with any boat, wherry, lighter or barge, except it be upon some extraordinary occasion to be allowed by a justice of the peace; but the keeping open of cooks' shops and vittalling houses, and the sale

of milk were tolerated. Afterwards the sale of fish was allowed, and watermen were allowed to ply on the Thames, coachmen and chairmen might be hired, and bakers were allowed to bake and sell bread on Sunday, and so forth; and the statute law discriminates so nicely in the matter of conscience, that the Factory Acts do not extend to the prohibition of the employment of Jewish women or children by a Jew manufacturer on Sunday, as the Saturday is the Jewish Sabbath.

In England a man may lawfully fish for salmon with a rod on Sunday, while in Scotland fishing for salmon on that day is altogether prohibited.

The Act of 29 Car. II., and the others, have frequently been the subject of judicial interpretation, and the first-named statute was held not to apply to the hiring of stage coaches, nor to justify stopping canal traffic on Sunday, nor to apply to a farmer attending to his own harvest, and so forth. In other words, the Act was strictly construed, and was confined in its operation to its special and express application.

Mr. Morison, for the defendants, in his able argument, cited several of the well-known decisions upon these Acts.

Mr. Browning, on the other hand, with careful ingenuity and painstaking research, met the other side by the contention that this sealing business was in effect a partnership, and should be governed by the principles which would apply to partners amongst themselves; but we held at once (and if it were needful, to cite authority upon similar cases in the whale-fishery), that the relation between the crew and the captain and owners is not that of partners, but is that of employe and servant on the part of the crew, and of employer and master on the part of the ship-owner and ship-master, just as is the case with sharemen in the cod-fishery.

Moreover, Mr. Browning contended that the rights of the plaintiff notwithstanding his refusal to take part in taking seals on Sunday, extended to one-third of the entire voyage or catch of seals brought in and delivered in this port; and that the obedience of any part of the crew to the Christian principle of keeping the Sunday holy would not deprive them of that right; and that the order to join in the work was not a lawful command, but one which might be disobeyed with impunity.

No matter whether Sunday-working is or is not the subject of ecclesiastical censure (or to what extent it may be so), according to the diverse views of the various denominations to

which a mixed sealing crew may belong; no matter how far a man may have to answer for it in the forum of the personal conscience; we have to regard the questions here raised from an entirely abstract point of view as questions of law.

Now, it has been doubted whether the Act of Car. II. and some other statutes, of which a summary has been given, have anything beyond a municipal application, and whether they form any part of the general body of English law which the colonists brought with them.

Assuming that the Act of Chas. II. was imported here with English settlement, it is impossible to say that it ever contemplated or in its terms could be held to include the seal-fishery; an occupation not *ejusdem generis* with anything in the Act, itself prosecuted on the high seas, and much more in its character resembling the excepted rather than the inhibited occupations of the statutes.

It appears to me, then, that we are obliged to hold that the directions of the sealing ship-master to the crew to employ themselves on Sunday in taking seals was a lawful command, and disobedience to such a command would bring recalcitrants within the apportionment clause.

It does not at all follow from this, regarding the conventional aspect of the case, that the court would hold non-compliance with such an order to be sufficient ground for absolute dismissal from service, or for depriving the offender of all share in the voyage, as might happen in many cases of breach of duty.

In this case, the judge of the court below is of opinion quite consistently with the evidence, that the master in taking off 3,700 seals only as the portion of the catch in which the Sunday non-workers were not to participate, behaved liberally towards them, and made an ample allowance to them for any trouble they may have had in connection with these seals before or afterwards. Moreover, there seems to be little doubt that a much larger number of seals, and a larger trip, if not a full load, would have been secured for the benefit of the owners and crew, if the plaintiff and his party had not failed to work on Sunday.

I think that the judge of the court below was right in holding that by "the catch of the said crew" is meant the result of those labors in which all were willing to co-operate.

If we had been permitted to take a different view of this matter, and to hold that the command to go seal-killing on

Sunday was illegal, on the ground of the employment being unlawful, then we should have been obliged consistently with that ruling, to declare that seals taken under such circumstances did not form any part of that property in which the plaintiff, who did not aid in acquiring it, was entitled to participate. Let the appeal be dismissed without costs.

Mr. Browning for appellant.

Mr. Morison for respondent.

PARSONS v. RYAN.

1892, May. CARTER, C. J ; PINSENT, J.

Mortgage—Power of sale—Proviso that power was not to be exercised without notice and default—Assignment of mortgage to third party—Redemption by mortgagor after foreclosure and sale.

A mortgage deed contained a covenant to pay at the expiration of three, five or seven years, and a power of sale in the usual form, with a proviso that the power should not be exercised till two months' notice in writing had been given. The mortgagor made default in the payment of the principal and interest. The mortgagee gave the notice under the mortgage, and subsequently sold the premises to a purchaser. The property, though offered at public auction, was disposed of at private sale and below its value,

Held—In an action by the mortgagor to set aside sale, that the notice of default having been given before default was made, could not be made to operate for the exercise of the power. The agreement as to sale was to be by public auction, whereas the purchase was made by private sale. The purchaser was bound to see the terms of the sale fell within the limits of the power. Sale set aside and mortgagor allowed to redeem.

THE plaintiff, a mortgagor of certain lands and premises near the town of St. John's, on the 18th February, 1890, filed a bill of complaint against the defendant, Ryan, mortgagee, for redemption on payment of principal and interest. To this defendant Ryan filed his defence on the 1st March following; and it being alleged that the defendant, Dooley, had become a purchaser of the premises, leave was given to add him as a defendant to the suit, and that the bill be amended. In the amended bill upon which this action is now proceeding, the plaintiff avers, *inter alia*, that after the execution of the mortgage deed, he had made valuable erections upon parts of the land; that on default in payment, defendant Ryan took process

of ejectment, and, judgment being confessed, the court stayed execution, plaintiff representing that he hoped after a short time to be enabled to pay off the mortgage debt; and that when he offered to do so, and asked Ryan for a release or assignment of the mortgage, he refused to accept the amount due upon the mortgage, having, as he alleged, made sale of the property to the defendant Dooley under a power of sale contained in the mortgage deed; that Ryan, through his broker or agent, improperly agreed that the property should be sold privately to Dooley for an unreasonable and inadequate amount in value. And the bill prayed that Ryan be enjoined from executing his writ of *habere facias possessionem*; that the sale or agreement to sell to Dooley be declared to have been fraudulent and be set aside; that Ryan be decreed to execute a release or assignment upon being paid principal and interest and costs upon the common law side, &c.

The defendants answered separately, Ryan stating circumstances that had occurred between him and the plaintiff, since the execution of the mortgage, and the frequent breaches of promises by the plaintiff for the payment of interest, which ultimately resulted in an agreement between them for payment of a stipulated sum for interest, and sale of the property at a time therein mentioned; and both defendants relied upon the *bona fides* of the sale to Dooley subsequently made, which they insisted ought not to be disturbed; that the plaintiff had lost the right to redeem, but should the court think otherwise, the Defendant Ryan submitted he ought not be required to assign the mortgage to any third person, but only to release it, and re-convey the premises directly to the plaintiff, who should as a condition precedent thereto, pay all costs and expenses incurred throughout these proceedings. The defendant, Dooley, prayed that the bill be dismissed as against him with costs.

This is a mere summary of the pleadings, as the circumstances connected with the several averments therein will be referred to in my examination of the evidence taken.

It appears that the mortgage deed was executed on the 15th June, 1882, in consideration of \$800, repayable at the expiration of three, five or seven years from the above date, with interest in the meantime, at the rate of seven per centum per annum, half yearly, on the 15th December and June, each year, with covenant for re-payment of principal, together with interest at the aforesaid times, the plaintiff mortgagor to remain in quiet possession until default in payment of principal or inter-

est; also with a power to sell either at public auction or private sale, after two months' notice, in writing, on default in the payment of the said *principal sum with interest* thereon as aforesaid, freed from all equity of redemption, &c.

The payment of interest would appear to have been fairly regular to June, 1885, and after that is a wearying correspondence between the plaintiff and the solicitor of Ryan demanding arrears of interest and promises to pay by plaintiff, which he was unable to fulfil. On the 26th October, 1887, Ryan, through his solicitor, gave plaintiff formal notice, under the provisions of the mortgage deed, that if the interest then claimed (£42) was not paid he would, at the expiration of two months from the service, proceed to exercise the power of sale of the mortgaged premises, as in and by the said mortgage given to him. On June 15th, 1888, the solicitor notified the plaintiff, at request of Ryan, that \$224 was due for interest, and if not paid the notice of sale would be followed by advertisement of the premises for sale by public auction; he was also reminded that he had not complied with the request to assign the policy of insurance against fire. The plaintiff being still unable to meet the demand, although he would appear to have striven to do so, an agreement was arrived at between them on 23rd June, 1888, that on Ryan giving plaintiff time to the 1st September he would pay \$200 at that date on account of interest due to the 15th instant, with interest thereon at seven per cent. per annum, until payment; also would repay premium of insurance Ryan had paid; and in default of payment of these sums he would, on demand, quit and surrender up the premises to Ryan or assignee within thirty days thereafter, within which time he might pay. It was further understood and agreed that as soon as conveniently after such surrender the premises should be sold by Ryan at public auction, by virtue of the power of sale contained in the mortgage deed, with all the authorities thereby given, and the amount realized above the mortgage and interest was to be paid to the plaintiff, his executors or administrators.

On September 8th, the amount not having been paid, Ryan's solicitor notified plaintiff that if the payment was not made within thirty days from the first of said month legal proceedings would be taken.

The plaintiff, not having fulfilled his agreements although endeavouring to do so, as appears by the correspondence, was, on July 3rd, 1889, notified by the solicitor that his instructions

to realize were positive, that he had no alternative, and that he had given Mr. Spry (auctioneer) the necessary direction to proceed to the sale of Cherry Hill. On the 4th July Spry advertised the premises for sale at public auction, within his office, (not stating where situate) on the 11th of that month. On the 8th, plaintiff enclosed \$60 to Ryan's solicitor, and referred to the large value of the property for security; again, on the 10th, offering \$100 he had managed to obtain, and another \$100 at the end of the month or sooner, and appealing for clemency; but the \$60 were returned, and the offers rejected. On the 11th the premises were put up by Spry; the highest bid was \$1,800, which was withdrawn, and there was no sale. Spry afterwards offered the property to Dooley (defendant) for £850; then for £600, but he would not give more than £500. Spry kept on negotiating with him privately, and a few days after the abortive auction, agreed to sell to Dooley for his offer of £500 or \$2000. Dooley signed the conditions of sale as if at an auction on the 11th September, in which paper it is stated that the highest bidder was to be the purchaser, ten per cent. on the purchase to be paid at the time of sale, balance on tender of a valid deed of conveyance, and on quiet possession of the property about 10th December then next ensuing.

In August, Ryan took proceedings in ejectment against plaintiff, and in the following term the latter confessed judgment with a stay of execution. Sometime in November of that year, 1889, the plaintiff, with Mr. Hally, deceased, tendered \$224 in gold for interest and insurance premiums to Ryan's solicitor, which he refused to take for these amounts, as it was not in compliance with his note of November 16th, 1888. There was \$28 spoken of as a disputed payment for interest, and the former amount was shortly afterwards offered to Ryan himself, who refused it, and referred the party, a witness, to his solicitor; he states in his evidence that he would not receive it without the principal sum. At this time there were two sums of £12 10s. and £8 10s. paid by plaintiff to Ryan for interest in January and June, 1885, by cheques; in the latter cheque is inserted "balance of interest to December last," which payments appear by the cheques produced from the Commercial Bank, but which were unknown to Ryan's solicitor, and apparently forgotten by Ryan to credit, and their correctness is admitted by him in his evidence. As I understand the plaintiff's statement, he insists that the \$240, irrespective of the \$28 disputed, was sufficient to cover the true amount due for principal

and interest under the mortgage, with the fire premiums.—When this offer was made there was not a word said, by either Ryan or the solicitor, of the sale to Dooley; and, except by rumour, the plaintiff does not appear to have had any intimation of it, as certainly there was no formal notice, and at the time when he met Ryan's solicitor in the street and spoke of having heard it, he, in an excited manner, denounced it as a fraud, or to that purport. There is no record of any such sale, and when Ryan was going to England in January, 1880, he signed a bill of sale (not produced) as an escrow to be delivered if matters should be arranged during his absence. The plaintiff testifies that he had not any formal knowledge of any such sale until the equity proceedings, and there was, therefore, no want of promptness on his part in taking action to have it cancelled. All the legal proceedings and letters are in Ryan's name. On application, Dooley positively refused to withdraw from his alleged purchase, assigning as a reason that he had to give up his slaughter premises at King's Bridge and required Cherry Hill property for that purpose, having lost the chance of acquiring another place offered to him; but it appears, contrary to his statement in his answer, that the other place was offered after he had made this alleged purchase, and not before.

When the advertisement for the auction appeared, the plaintiff complained that the property was misdescribed in quantity as 7 acres and 12 perches, whereas it was 12 acres, but it was not corrected, and was regarded by him as prejudicial to his interests. There are other incidents connected with this transaction, but, as they can have no material bearing on my decision, it is unnecessary to refer to them further than that the plaintiff did pay into court, on motion of counsel for Ryan, the principal and interest and such costs as were then ordered by the court.

The courts always favor redemption when they can consistently do so, and to such an extent is this principle recognized, that, in the case of *Campbell vs. Holyland*, 7 C. D., 166, it was decided that in a foreclosure action the mortgagor can redeem after the order for foreclosure absolute, and notwithstanding that after the order the mortgagee may have disposed of his interest to a purchaser; *Jessel, M. R.*, in that case, observing that, although the order of foreclosure appeared to be the final order of the court, it was not so, but the mortgagee still remained liable to be treated as a mortgagee, and the mortgagor still retained a claim to be treated as a mortgagor, subject to

the direction of the court. The mortgagee knew perfectly well that there might be circumstances to enable the mortgagor to redeem; and everybody buying the estate from the mortgagee, who merely acquired a title under such an order, was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion, by the Court of Equity, which had made the order. What that discretion is must depend upon circumstances, the nature of which is discussed in the judgment, and the whole judgment may be with advantage referred to. The power of sale in the mortgage deed in question required two months' notice after default made in payment of *principal with interest*, which would not have occurred, as I construe the proviso, until the 15th June, 1889. The notice given 26th October, 1887, was prior to the default, and could not be made to operate for the exercise of the power—see *Selwyn vs. Garfit*, 38 C. D., 273; and without raising a question on this point, it appears to me that the agreement of 23rd June, 1888, is that which is binding on the parties, both as to time and the mode of conducting the sale on default of its conditions, namely, by public auction. It is evident that the sale made by Spry to Dooley was not in compliance with this compact, and that the document to which he placed his signature as a purchaser untruthfully represents a sale at public auction, as it was made several days after the abortive auction, and privately. This document, which Dooley designates a bill of sale, was, he says, read over to him by his son at the time, and he must have been aware of its contents. He was bound to see that the terms of the sale fell within the limits of the power, and in the mortgage deed, which was coupled with the agreement, there is no clause exempting a purchaser from responsibility as to antecedents of the sale, (*Warren vs. Jacob*, 22 C. D., 222; *Selwyn vs. Garfitt*, *supra*), and even if there had been it would have made no difference in this case.

The evidence of those whom I should suppose to be competent persons on the question of value shews that the property was worth considerably beyond \$2000. Besides, the conductor of the alleged sale (Spry) would not deny that he might have said that the place was sold very cheap to Dooley, and that it was a pity to sell it at that price. However, on this point, if the sale had been properly conducted, as when a mortgagee exercises his power of sale *bona fide* for the purpose of realizing his debt and without collusion with the purchaser, the

court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.—*Warren vs. Jacob, supra.*

After a most careful investigation of all the circumstances I am of opinion that the purchase cannot be maintained, and that the plaintiff is entitled to redeem under the usual redemption decree; that Ryan should pay costs from the time of payment into court, as he should not thereafter have opposed the prayer of the bill; and that the defendant (Dooley) should pay costs from the time of filing and service of the bill, as he should have known that he was not justified in endeavouring to maintain an unauthorized sale and purchase. As to the assignment of the mortgage to a third party by Ryan, I cannot find any authority to sustain that position, and none has been cited; but on the contrary, in *Coote on Mortgage, p. 734, 4 Ed.*, "it seems that, *stricti juris*, a mortgagee cannot be compelled to assign the mortgage debt on redemption either by the mortgagor or by a stranger, though he is bound to convey the estate"; citing *Smith vs. Green, 1 Coll., 563*; *Dunstan vs. Patterson, 2 Ph. 341*; see also *Pearce vs. Morris, 21 L. T. N. S., 257*, and on the payment of costs by mortgagee after tender on refusal to re-convey.

Mr. Justice PINSENT concurred in this judgment.

Sir J. S. Winter, Q. C., for plaintiff.

Mr. Kent, Q. C., for Ryan.

Mr. Greene, Q. C., for Dooley.

1892, *May*. CARTER, C. J.; LITTLE, J.; PINSENT, J.

Lease—Construction — Way — Appurtenances — Common right of way.

Where the defendant leased a "shop and premises" to the plaintiff, having two doors abutting on two different streets, the defendant claimed a common right of way to and from the said premises through a third door which specially led to a dwelling house, portion of the same premises and occupied by another tenant of the defendant. The lease was silent on what the appurtenances to the shop and premises were. The defendant refused plaintiff the right to use the said door. In an action of replevin, the defendant having distrained for her rent,

Held—That the third door or passage was appurtenant to the dwelling house only and not to the "shop and premises." A way not strictly appurtenant will not pass under the words "all that shop and premises," unless it can be concluded that the parties intended to use those words in a sense more inclusive than their ordinary legal signification.

THIS is an action of replevin in which the plaintiff claims damages and return for an alleged illegal distraint upon his property for a quarter's rent (\$100) of premises alleged to have been due on the 1st June, 1891, from part of which premises he alleged that before the same became due he was wrongfully evicted.

It appeared that by agreement under seal, bearing date 17th August, 1889, the defendant let the plaintiff, for a period of two or five years from the 1st September then next, "the shop and premises situate in Water street and Queen street, then in the occupancy of the defendant, also that shop and premises immediately adjoining the aforesaid shop and premises, and held and occupied by the said defendant and used by her as a licensed spirit store, at the annual rent of four hundred dollars, payable quarterly on the 1st Dec., March, June and Sept.

The plaintiff carries on a licensed spirits retail business in the shop to the westward with an entrance from Water street which connects with the adjoining shop for provisions and groceries, having a direct entrance both from Water and Queen streets. Above this shop is the hall entrance, through a porch upon the latter street, to the dwelling-house, and a few feet therefrom further up the street is a large door with a small passage-way inside, leading by a stairs to the kitchen, and through this passage-way, but for a screwed-up or barred door, there can be communication direct to the ware-room just in the rear of this shop. The plaintiff contends that by his lease as part of the premises of the shop, he is entitled to the use of this upper doorway for all purposes of his business, for entrance

to and exit from his ware-room, which claim the defendant resists, contending that this doorway does not form part of the demised premises, and exclusively belongs to and is appurtenant to the dwelling-house only, no part of which was leased to the plaintiff but reserved for her own use and that of her tenants, although the reservation is not expressed in the lease. Up to the time of the letting all the premises were occupied by the defendant, and subsequently she let the dwelling-house to a tenant. For several quarters up to 1st June, 1891, plaintiff paid his rent freely as it became due, and then he refused longer to do so, from not having the use of this doorway, when after distraint for the rent the plaintiff replevied, hence this action. I have had a view of the premises. I must now endeavour as best I can, both as judge and jury, to ascertain from the document, evidence and circumstances, what was the real intention of the parties as to whether or not the use of this doorway and passage were intended to be, and were included within the general description "shop and premises."—*Woodfall*, p. 133, 12th ed. The evidence on the part of the plaintiff of the use of this doorway for the passage of merchandize in connection with the shop during and prior to the defendants' occupation of all the premises, including the dwelling part, is exceeding scant; one witness says he saw goods passing in and through, does not know where they went, or where the door connected; he saw oats, the only kind of merchandize he could apparently remember, going through eight or ten years ago, in the late Mr. Thorburn's time. Another witness, a builder, who worked for plaintiff when fitting up on first occupation, could not say which doorway, whether the porch or the one in question he passed through when there. The shop door on Water street was his principal way of communication. Another, a painter, worked for plaintiff two years ago; when passing by, but not when working, remembered seeing a large double door, but did not see any goods pass through, there six weeks altogether, and went through the shop door, having worked at front bar-room. Then two apprentice lads deposed to having been engaged in putting up a stove with family for their master for plaintiff before he opened shop for sales; they called at the porch door and a girl would open, let them in through, and close the double door fastened inside. Plaintiff opened it sometimes; he was then employed in getting things into the shop. On the other side we have the evidence of the defendant's son, who is thoroughly acquainted with the premises, resided in the

house 25 years, and was associated in trade with his late father for ten years, carrying on business on the same premises and of much the same character as the plaintiff's. The door in question, when opened, was for access to a pork store by itself clear of shop; we went to this store from the shop, and did not use the door in question. In 1883 had a dining room on south side of shop, the space of which was added into shop and a dining room made upstairs, also a kitchen over this door which led by a stairs to the kitchen, and a short cut for the servants to them, also into the shop from the hall a partition separated the store from the hall which was part of the dining room partition, same now as in 1884; never used the large door as a store door to put goods in, brought all through the shop door. There was no other way to the kitchen unless through the dining room up the front stairs, coals and wood for house always brought through that door, which was deposited in the cellar under the hatchway in hall; the passage door is up and I believe was so when plaintiff took possession; never used for access to house but to the pork store. Plaintiff had the use of passage door when fitting up, but not afterwards; he paid rent to defendant up to her leaving the country in August, 1890, afterwards to myself, wife and Mr. F. Morris. Heard of no complaint from plaintiff about the doorway until May, 1891, and then through the tenant of the house, Mr. Driscoll, to whom the plaintiff spoke, and on June 9th received a letter from plaintiff's solicitor that plaintiff would hold him liable in damages as defendant's agent for the closing up of a door in the premises, and would withhold payment of rent until the obstruction was removed. This witness also testified that plaintiff, about November, 1889, called on his mother, the defendant; asked her if she would allow him to put a lock on this door and let him in and out, and allow him the passage all night or on Sundays, as he did not care going through the shop door, being the only entrance he had. At this time he was residing in apartments he had fitted up in the store. Defendant replied she would not consent on any account. The tenant of the house, Mr. Driscoll, who was examined, said he had always used this door for his purposes without interference, and claimed it as his; the stairs led to his private apartments; through the door he had brought coals, which he deposited in recess in hall under stairway; he had the use of the cellar through a hatch for coals, but did not much use it. Plaintiff first asked him for use of door in May last; told him he should see Mr. Thorburn;

this was after he had removed from residing in store; he spoke of opening the door; I advised him not to use violence; the inner door from hall was always fastened up. A carman, who was employed by Mr. Thorburn in 1884 and for two and a half years, deposed he was carting and taking away goods all the time; never used the double door in question to take goods in or out; took them through the shop door on Queen's street or that on Water street; the double door was used to bring in coals and for Mr. Thorburn going in and out the distillery; never opened for goods in business; the door always closed, but he would use the half of it for purposes mentioned; oil casks would go through the shop doors. The plaintiff sworn, stated he had the use of the door and passage when fitting up, both before and after 9th September, 1889, when he opened shop, for a couple of months or so; property of his passed in freely through these doors to the ware-room at this time. (On cross-examination.) This was with permission of defendant; would fasten the Water street door of shop in the evening and pass out through this door, the defendant's servant girl putting the bar on as he hadn't a key; he gave permission to defendant, at request of Mr. E. Morris when signing the lease, to put her coals in cellar; some days after closing this doorway and passage he asked her to open them and said it was part of his premises; she said she required them for domestic purposes; never said he was going to put a lock on the premises; his wife asked defendant's son to put a puncheon through this door after it was closed; can't say he was present; did not ask as a favor, nor did he ask at all that he remembered. All the property defendant had left in the shop was an old pair of scales. Mr. Edward Morris positively denied that he ever made the request to plaintiff of the cellar for defendant's coals, and was never present with him during all the negotiations for lease, which were with his brother, Mr. F. Morris, who also gave evidence in confirmation, he it was who prepared the lease and had instructions from defendant.

The defendant was examined under commission at Chicago, and denied that by the lease or the agreement she gave the plaintiff a right to use the door in question, but that at the time of cleaning shops and before entering into possession he often used her hall door, and by the other door, the shop door was barred on inside as she had goods on premises. Previous to his taking possession he bought a lock to place on this door; she then distinctly told him he had no claim to her dwelling-

house door, and explained to him that door belonged to the dwelling-house; some months after he had possession he asked as a privilege to put in a puncheon through this door; this she would not grant as the inner door from hall to shop was fastened by her orders. After taking possession he paid his rents promptly, and made no further claim to door until the present time.

The conversations and contradictions of the witnesses and parties are not without significance in arriving at a conclusion, but I have endeavoured to do so independently so far as I possibly could from the terms of the lease and the evidence immediately applicable to ascertaining the premises in connection with the shop.

When the plaintiff was fitting up apartments for a residence in part of the grocery store, and which he voluntarily did for his own convenience, he was permitted, or had the use of this door and passageway in the manner described by the witnesses, and the only independent evidence given on his part of property which passed through there was the stove and funnelling by the apprentice lads. When the dwelling house and shop were occupied by the defendant, and previously and before severance, it is reasonable to suppose that for convenience sake the inmates of both would for some purposes occasionally have ingress and egress through there, and from the time of the placing of this door on Queen street, the evidence abundantly shews that it was never used from the first for the purposes of merchandize or business, or for strangers to pass to and fro, the connection through this to the kitchen by the stairs, thence to all the upper part of the house and down the other stairs to the porch hall door, immediately connecting the small hall with the dwelling part, satisfies my mind of its being appurtenant to the dwelling and not forming part of the premises demised in connection with the shop.

There are most ample means of access and egress to and from the shop and ware-room for all purposes from the two doors abutting on Water and Queen streets, and which were alone used by the former occupants for their business, no part of the dwelling house or its appurtenances was let to the plaintiff, and it is evident that if there were a free passage through the door in question along the small hall into the shop premises and therefrom, the dwelling house, with different occupants from the shop, would be in such an apparent condition of insecurity and inconvenience, that one having the oppor-

tunity of viewing the premises, could hardly conceive it was contemplated or intended when the lease was entered into of including this part with the shop and premises demised to the plaintiff. Besides, it appears that this doorway was always kept fastened and the bar taken down when needed for temporary uses. Apart from the payment of several quarter's rent, although that circumstance might not unfairly enter into consideration, as also the refutation on oath of disinterested witnesses of the defendant, asking permission of the plaintiff to deposit her coals in the cellar, I am of opinion this double door and hall are an appurtenance of the dwelling house and, that the defendant is entitled to judgment in the two actions of replevin for the rent, and interest at six per cent. per annum by way of damages from the time when it should have been paid to the entering up of judgment.

HON. MR. JUSTICE LITTLE:

I see no reason or ground set out in the evidence or in what is called the physical condition of the property to lead me to differ from the conclusion arrived at in the judgment of the Chief Justice.

HON. MR. JUSTICE PINSENT:

Regarding what is termed at the bar the physical aspect of the premises alone, I should have inclined to hold that the passage was a common right of way, but the question is one of fact, and the acquiescence of the plaintiff until the expiry of his first term in the sole use by the defendant is such pregnant evidence in solving the doubt, that I consider the court would not be justified in disturbing the finding of the Chief Justice.

Sir J. S. Winter, Q. C., and Mr. Morison for plaintiff.

Mr. G. Emerson and Mr. F. Morris for defendant.

1892, *June.* BY THE COURT.*Contract—Specific work—Compensation for services not within scope of employment.*

Where it appeared that the plaintiff, who, whilst on a mission abroad for the defendants, for which he was compensated, performed, at their request, certain services outside the scope of his mission.

The court was of opinion that, there being no express or implied contract that he was to receive compensation for the extra services performed, that he was not entitled to the same, and that the work so performed must be held to have been within the scope of his employment.

THIS is a claim made by the plaintiff for the recovery from the defendant government of the sum of £500 sterling, alleged to be due to him by way of commission, for services rendered to the government in the years 1886 and 1887, by reason of his having raised a loan of £100,000 from the London and Westminster Bank for the public use of this colony.

The plaintiff's case is shortly as follows :—He states that the legislature, having passed the first of the well-known measures called the "Bait Acts," the local government became desirous of engaging his services as a delegate to advocate the confirmation of the measure by the Imperial Government; and he was thus engaged by them upon the express terms, so far as money was concerned, of £125 stg. for travelling expenses. This arrangement was made in the latter part of October, 1886, and on the 10th of November following, the plaintiff received from the Colonial Secretary of this island his letter of instructions—a letter confined wholly to the question of the Bait Act.

But the plaintiff alleges that, between the time of this retainer and the receipt of the letter in question, another matter arose, that of raising, in England, for the use of the colony, a temporary loan to form part of a contemplated permanent loan of £200,000 or £250,000. That he, the plaintiff, attended a meeting of the then Executive of this colony and received from them verbal instructions to use his endeavours while in England to carry out this object.

The plaintiff proceeded to England as the diplomatic agent of the Government of Newfoundland in relation to the Bait Act, and while there upon that business he was actively engaged in negotiating with several bankers for the advance of money to the colony upon the contemplated loan.

Considerable correspondence, both by letter and telegraph, with the Government of Newfoundland ensued.

The plaintiff, from his experience and local knowledge, was in a specially good position to conduct the negotiations for a loan, and his statements so satisfied the London and Westminster Bank, that it undertook to advance £75,000; the Savings' Bank of Newfoundland pledging for that purpose a sufficient amount, in the colonial debentures held by it, to cover that sum, until borrowing powers should be conferred upon the government by the legislature to raise the larger amount, out of which the advance was to be repaid; and the London and Westminster Bank was to be the agent of the government in putting the loan on the market.

There is and can be no dispute about these statements of fact.

The plaintiff returned to this country. He does not allege that he was detained in England any longer than he otherwise would have been because of the association of this business with that of his delegation in the matter of the Bait Act.

In April of the following year, 1887, the plaintiff again went to England as a delegate of the government upon the question of another Bait Act, associated on this occasion with the Premier of the day, Sir R. Thorburn, and while in England they both represented the colony at the Colonial Conference.

Again the plaintiff's services were enlisted in obtaining from the London and Westminster Bank a further temporary loan of £25,000, making in all £100,000.

For these financial services the plaintiff makes a claim upon the defendant government of one half per cent., equal to £500 sterling.

Now, it would hardly have required the testimony of the solicitor of the Bank of England, the manager of the Alliance Bank, and other eminent and expert authorities called for the plaintiff to satisfy us that for such skilful and successful services in negotiating the loans in question the charge of one half per cent. would, under ordinary circumstances, have been exceedingly just and moderate and well earned.

The formal defence to this case is: (1.) That the services of the plaintiff were not engaged by the government; (2.) That he did not render the services for which the claim is made; and (3.) That for any he did render he had been fully paid.

We dismiss the first two as simply disproved by the officials of the late ministry themselves, for while there was some difficulty about bringing to their recollection the fact of interviews in which the plaintiff, prior to his leaving Newfoundland in

November, 1886, was consulted and instructed about the loan, these were finally admitted; and the constant and repeated and important correspondence by mail and telegraphic cypher, extending over some months, would in itself completely dispel these two lines of defence, which, indeed, can be hardly regarded as serious.

The fact remains that the defendant government under the late ministry, and now under the present, repudiates the plaintiff's claim.

We are of opinion that the defence upon the two first grounds fails, and that the only serious and substantial answer to this action is that the plaintiff has received all the remuneration that he deserved, or contracted for, or has any right to expect. Is this so?

The principal witnesses for the defendant government are Mr. Fenelon, the late Colonial Secretary, and Sir R. Thorburn, the late Premier.

The memory of the first-named utterly failed him at first with regard to the origin of the plaintiff's authority to act for the government in the matter of the temporary loans, but subsequent reference to a private diary satisfied him that the plaintiff's version of that matter was correct, and that the interview with the Executive, described by him, had taken place.

It is a remarkable fact that no Executive minute was kept of proceedings of such importance; and that upon the testimony of frail and erring memories is proof regarding such transactions dependent, when controversy concerning them arises.

The evidence on both sides goes to shew that the question of the plaintiff's remuneration for this service formed no part of the negotiations, this was left *sub silentio* and to become a matter of inference.

With regard to the second delegation, in which Thorburn and Shea were associated, there is an Executive minute of the 21st Feb., 1887, giving effect to the address of the House of Assembly, and stating that for this service these gentlemen were to be allowed \$1200 each.

It appears that afterwards, and while they were engaged upon this delegation, they both came to represent Newfoundland at the Colonial Conference.

Sir R. Thorburn's evidence is of the utmost importance. The description he gives of the position of the plaintiff in his relation to the colony in raising the loans is that he (Shea) was a

"confidential friend of the Government;" that he was not engaged "except in a general way, to ascertain whether a loan, temporary or otherwise, could be got, and upon what terms;" that any services on the part of the plaintiff in this regard were but incidents of his mission upon other matters; that nothing was said or intended in the way of extra compensation for them, and that he believed the plaintiff was, for his combined services, satisfied with the amount of £500 stg., which he says was the sum received by each of them (Shea and Thorburn) for their service at the Colonial Conference and upon the second Bait Bill delegation, and he concludes that Shea was satisfied with this amount in addition to the previous payment to him of £125 stg., as he expressed no dissatisfaction, and made no claims for any larger sum, so far as he is aware, until he wrote from Nassau in March, 1888.

Sir R. Thorburn states, that upon these grounds the ministry, of which he was a member, repudiated the plaintiff's claim. This witness asserts that the permanent loan, upon account of which the advances of £100,000 had been made, through Sir A. Shea, was afterwards effected by himself, and without any charge beyond the amount of his passage money from England.

It will probably be thought that in this evidence Sir R. Thorburn takes too narrow a view of Sir A. Shea's position in regard to the loans. His functions were not confined to inquiries; he conducted and performed negotiations subject to the assent of the local ministry, and brought them to so satisfactory a conclusion that the money was obtained by the government; and moreover, success in this matter would seem to have been the foundation of the subsequent permanent loan.

Nevertheless, the question remains whether under any contract, express or implied, the plaintiff is entitled to recover from the defendant government an amount greater than that he has received.

The mere fact, standing alone, of the absence of any reference to the subject of compensation at the time the plaintiff received his instructions from the Executive, or of these instructions being verbal, while those regarding the Bait Act were formal and reduced to writing, would not be regarded as absolutely concluding him; but taking these circumstances in connection with the facts, that the plaintiff returned from his then delegation and made no further claim on account of this mission; that he subsequently went upon another mission for the colony, conjointly with Thorburn, upon an Executive

vote of \$1200, which, when attendance at the Colonial Conference was associated with their duties, became doubled (£500 stg.); that the plaintiff, upon his second return to this country, made no further charge; that he remained here for many months without doing so, and that no claim was put in by him, and no charge made for this particular service, as distinguished from his other functions, until March, 1888, and when, in fact, he had left this Island to reside at Nassau, in the West Indies, it appears to us that the court must give effect to the evidence of Sir R. Thorburn, who was the premier of the day, and to that of Mr. Fenelon, the Colonial Secretary, and order that judgment be entered for the defendant government. We think, however, that as in two particulars a line of defence has been attempted which has completely broken down, and which should never have been advanced, the judgment ought to go without costs.

Mr. Kent, Q. C., for the plaintiff.

Sir W. V. Whiteway, Q. C., (*Attorney General*), and *Hon. Mr. Morris*, for the defendant government.

DAVIDSON v. DESBARRES.

1892, *June*. HON. MR. JUSTICE PINSENT, D. C. L.

Landlord and tenant—Lease—Covenants, title and quiet enjoyment—Breach—Measure of damages.

The plaintiff, being in possession as tenant of the lessee for his unexpired term, entered into an agreement with the lessor for a new term of the premises. The lessor covenants that he had authority to demise, and covenanted for quiet enjoyment. The defendant lessor failed to put the plaintiff in possession. It appeared the rent paid by the plaintiff to the lessee was excessive, and that which he was to pay under the new lease, though much less, was only the value of the property.

Held—The action was not of a meritorious character in that both parties had been speculating as to the probability of the lessee losing the property, and thus perfecting a lease of mutual advantage. Having regard to the relations of the parties only nominal damages would be adjudged.

THE plaintiff claims that the defendant made to him a lease of the dwelling-house, shop and premises situate on Water street, in this city, for a term of thirty years, commencing on the 1st day of November, 1889, at the annual rent of \$480;

that the defendant covenanted with him that he had full power and lawful authority to demise these premises for that term; and also, that the defendant entered into the usual covenant for quiet enjoyment.

The plaintiff sues for a breach of these covenants by the defendant. He alleges: (1.) That the defendant had not authority to make the demise; (2.) That the defendant had given a prior lease of the property to one Duchemin, who entered upon it and ejected the plaintiff.

The case is a very peculiar one, in that the plaintiff was already himself sub-lessee of Duchemin for an unexpired term of twelve years, of the shop part of the premises, at the rent of \$580; and Duchemin had, under DesBarres, a term of fifteen years to run in the entire property demised by defendant to the plaintiff, at the rent of \$360.

But the plaintiff, believing that he would be in a position to eject Duchemin by the first of November, 1889, and the parties to this action being both desirous that the plaintiff should acquire from the defendant a long term in the whole property at a higher rent than that paid by Duchemin to DesBarres, viz., \$480, and at a less rent than that paid by Davidson to Duchemin, and upon condition of the plaintiff spending a considerable sum in improvements, the defendant undertook to give, and the plaintiff to accept, the lease in question.

The plaintiff was, as I have stated, under a rent to Duchemin, for the shop premises alone, of \$580 per annum.

The defendant, having failed to eject Duchemin, was consequently unable to give the plaintiff possession of that part of the demised premises represented by the dwelling-house; but the plaintiff continued and has ever since remained tenant to Duchemin of that part (the shop premises) of which he was previously the sub-lessee under Duchemin.

The defendant pleads that the plaintiff was not evicted by him; and upon this issue I am clearly of opinion that the defendant is entitled to recover.

Into the house the plaintiff had never entered, and, therefore, he could not have been evicted from it; and from the shop premises he, as a matter of fact, never has been evicted, for he has remained and still remains in possession as before, upon the strength of his own title.

As to the breach of covenant for title to demise, the defendant has paid one dollar into court as an amount sufficient to satisfy the plaintiff's claim.

It will be apparent that this is not a meritorious action, for, under the circumstances, it is clear that the parties to it were speculating in concert upon the probability of Duchemin losing the property, and of their new arrangement coming into effect.

However, there remains the fact of the defendant's covenant, and the question upon this issue is one of damages only.

I am of opinion that they would be purely nominal in regard to that part of the premises (the shop) which the plaintiff himself held from Duchemin, for it was the plaintiff's own title under him which is the origin of the breach.

The authority of *Lock vs. Furze*, 1 C. P., p. 441, an exceptional and peculiar case in itself, was cited to sustain the position that as a party to whom a lease, becoming void, had been granted, was obliged to pay a largely increased rent to the true owner for the same premises, he was entitled to recover damages representing the difference between the rent reserved by the void lease and that payable under the substituted one.

It is not for me to question the propriety of that decision, but it is at least very plain to me that the principle which governed it can have no application here, where, by the plaintiff's own act prior to the defendant's covenant, he had bound himself to the payment of the larger rent, a fact that can in no way be regarded as a consequence of the defendant's breach of covenant.

The question of damages here resolves itself mainly into one of the true value of the term the plaintiff was to have received.

In the earlier stages of this case I thought the plaintiff was about to maintain a substantial claim in this respect, for the evidence seemed to point to the acquirement of a valuable bargain by the plaintiff under his new lease from DesBarres, and, if so, he would be entitled to recover, as upon the difference between the marketable or full value and the less amount he had undertaken to pay in the shape of rent and improvements.

At the close of the plaintiff's evidence, however, he cut this ground from under himself, as he swore that he paid, under pressure of circumstances, an excessive rent to Duchemin for the shop; and that the rent reserved under his lease from DesBarres, together with the amount he would have had to expend upon repairs and improvements, was the full value of the place.

The main ground, then, for his claim of damages is gone; but, on the other hand, I do not think that the plaintiff is necessarily restricted to the recovery of simply nominal dam-

ages. I am of opinion that considerations of convenience and preference and disappointment may be taken into some account. At the same time these are considerations of a very indefinite and somewhat sentimental character, and looking at the relations of the plaintiff and the defendant and Duchemin, and the circumstances under which the lease was obtained, I am of opinion that the justice of the case will be met by giving judgment for the plaintiff for the sum of fifty dollars with the general costs of the cause.

Mr. Kent, Q. C., for plaintiff.

Sir J. S. Winter, Q. C., for defendant.

PITTS v. O'DWYER.

1892, *June*. CARTER, C.J.; LITTLE, J.; PINSENT, J.

Practice—Costs—Consolidation of distinct causes of action—Judgment for plaintiff on some issues, for defendant on others—Apportionment of costs.

Where, in an action combining several distinct causes of action, the plaintiff obtains judgment on one portion of his claim and the defendant on the other,

Held,—The plaintiff is entitled to recover general costs of suit, that is costs which would have been incurred had he confined himself to that portion of his claim upon which he succeeded. The defendant is entitled to all costs of resisting those parts of the plaintiff's claim which has been defeated. In taxing costs in an action comprising distinct claims and which result in separate issues, the costs should be treated distributively.

THIS is a question of costs under the Judicature Act, the 91st section of which, in conformity with the English rules, enacts "that where issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and in fact, shall, unless otherwise ordered, follow the event." The plaintiff claimed in three distinct causes of action, 1st, trespass for seizing a vessel; 2nd, wrongful conversion of a large quantity of goods; 3rd, money had and received. The jury found for the defendant on the two first issues, and for the plaintiff on the third issue, with damages at \$400.

All arose out of a smuggling transaction under the Customs' Act, and the \$400 was for a penalty which had been irregularly imposed but had been paid, and, as it was considered by the jury, under duress. Counsel for the plaintiff moved for the

delivery of the *postea* to him as under the old practice, contending he was entitled to the general costs, a distinct issue having been found for him, and cited for that position *Smith v. Edwards*, 4 Dowl. P. C., 621; but in *Stacey v. Long*, 6 Ib., 616, there was the same contention, two of the issues having been found in favour of the plaintiff and one for the defendant. Tindal, C. J., and Bosanquet, J., held that the substantial question had been found for the defendant, and the *postea* was ordered to be re-delivered to him. *Smith v. Edwards* was cited, and apparently not regarded as an authority in sustainment of the plaintiff's claim.

The mode of entering judgment is now regulated by the Judicature Act. These cases were decided under the old practice and may be referred to as guides in the application of that which now prevails, under which the case of *Myers. vs. Defries*, 4 Ex. D., 176, Ib. 15 & 185 (1879-1880), was disposed of, in that there were three distinct causes of action and issues, one of which, with a farthing damages, was found for the plaintiff and the two others for the defendant. There was, with all respect, what might not inaptly be termed a see-sawing between the different courts as to the manner in which the taxation should proceed, and different decisions were arrived at. I shall follow the language of the decision of Baggally, L. J.: "If separate trials ordered, defendants would have had costs of those on which they succeeded, and, if separate actions, they would have been entitled to their costs upon succeeding; the costs must be taxed according to the former practice on the common law side and must be distributed according to the events of the respective issues." There seems to be no question among the judges that "event" ought to be construed distributively.—*Ellis vs. DeSilva*, 6 Q. B. D. 521. I may refer to *Wheeler vs. The United Telephone Co.*, 13 Q. B. D., citing in full *Contard vs. Carr* and *Lund vs. Campbell*, 14 Ib. 821, in which the costs were to abide the "event" on the finding of an arbitrator, who found for the plaintiff on all the issues joined upon the defence to his claim and the full amount of defendant's counter-claim, which exceeded that of the plaintiff's by £97 3s. 5d. The plaintiff having entered judgment there was an appeal, per Lord Coleridge,—"event" means "events"—and the party who succeeds upon the whole, where there are various issues, some for the plaintiff and some for the defendant, is entitled to general costs; but the unsuccessful party is entitled to the costs of the issues upon which he has succeeded, and so

as to give the costs to the persons who have succeeded in proportion to their success; and that the judgment should be reformed. Per Lindlay, L. J., the judgment ought to be entered for the defendant for £97 3s. 5d., with costs of the action, reference and award; but the judgment ought to direct that the defendants must pay the costs upon which they have failed, the plaintiff having substantially failed ought to pay the costs of the appeal. To the same effect was decided in *McLean vs. Goodman*, 6 T. L. R. 185; the defendants having substantially succeeded were entitled to the general costs.

In the case before us I can have no doubt that the substantial issues arising out of the same transaction were found in favour of the defendants; and, as that would appear from the authorities to be the principle upon which the general costs are awarded, I think the defendants are entitled to them here. After all, I do not imagine there will be much difference, as I understand from the master he has taxed distributively according to the events.

MR. JUSTICE LITTLE:

In this cause the plaintiff, in his statement of claim, charged defendants: in trespass, for wrongfully seizing his vessel; and secondly in trover, for unlawfully seizing, taking and converting his goods; and thirdly, sought for the recovery of \$400, alleged to be wrongfully obtained from plaintiff. The damages were laid at \$3,270.

The jury found for the plaintiff on the third count or claim for \$400, and in favor of the defendants on the two claims in trespass and trover. Under these circumstances plaintiff's counsel contends he is entitled to have the general costs of the cause, and the entering up of judgment therein.

The question is novel and somewhat complex owing to the character of the findings, and the construction to be applied to the rule governing in the general subject of costs under our Judicature Act.

Unquestionably the main grounds on which the plaintiff rested his claim for damages, or to recover in the action, were those involved in the charges for the trespass to his vessel, and the wrongful conversion of his goods; the claim for the \$400 involving a very subordinate place in the cause of action so set out in his claim.

The matter for determination is one entirely subject to the terms or provisions of the Judicature Act and their application and meaning. We find by section 91 of the Act in question (1889) that when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, 'both in law and fact, shall, unless otherwise ordered, follow the event. On reference to a few adjudications of authority in relation to this section and its operation, we find that an interpretation or meaning has been affixed to this phrase or term, "event" in this connection rendering the determination of the master less difficult than it at first appeared to be. Is is laid down in *Stroud's Judicial Dictionary* that the word "event," so used, is a *nomen collectivum*, and may be said to be equivalent to "result," of which there may be more than one in the action or enquiry.—*Myers vs. Defries*, 43 L. J., Ex. 270. Event is, therefore, to be read distributively.—6 Q. B. D., 521. The result of each distinct issue, the verdict of a jury, or the finding of the court on such issue in an action or enquiry, would be the "event" thereof; the costs of which would go to the party in whose favour it would be found. This, then, being the meaning authoritatively applied to this phrase, as it stands both in the English Act and our own, we have only to apply it to the circumstances presented in this case in order to satisfactorily determine the matter in question here. We have then a distinct finding in favour of the plaintiff on an issue arising out of his statement of claim; that is the result or event in his action, and on it he would be entitled, as plaintiff, to the general costs so far necessarily incurred by him for the support of that issue. On the other hand, the result or findings on the two issues in favour of the defendants entitle them to costs on these two events in their defence to the claim of the plaintiff. The judgment can be entered up by either party, but must be entered distributively.

It will be seen, on reference to recent decisions and rulings of the English courts, that in cases of claim and independent counter-claim the taxation of costs is regulated and governed by rules having a somewhat similar application to that recognized in such cases as the present. The costs of the claim are to be taxed as though it were a cause by itself; but if there are issues on the claim, and the plaintiff succeeds on the claim but fails on some issues, he will get the costs of the cause and the defendant will get the costs of the issues on which he has succeeded. The success of the defendant in recovering a larger

amount on his claim than what may be recovered by plaintiff on his claim, will not give defendant the general costs of the action; *Sharpnell vs. Laing*, 36 W. R. As to the apportioning of the common dues, see *Hewitt & Co. vs. Blumer & Co.*, *Times*, L. R., 221; also, *Ward vs. Morse*, 31 W. R., 936.

Under the exceptional circumstances connected with the hearing of this argument, I am of the opinion the parties should go without the costs incurred on it.

HON. MR. JUSTICE PINSENT:

In this case the plaintiff sued in trespass and trover; (1.) For detention of a ship and for the recovery of goods said to have been wrongfully seized by the Customs; and (2.) For the repayment of an amount of \$400 exacted from him as a penalty for an alleged breach of the Customs' Management Act.

There was judgment for the defendants upon the first and larger claims; and in favour of the plaintiff on the second claim.

It is true that all the causes of action arose in a general way out of the same set of circumstances, but they were perfectly distinct in their character and might have been the subject of separate suits; in fact, they could not, under the old practice, have been all joined in the same declaration.

I hold that the plaintiff is entitled to recover the general costs of the action, that is, those which would have been incurred by him in his proceedings supposing that his action had been confined to that claim only upon which he was successful; and that the defendants are not entitled to recover from the plaintiff such of their costs as must have been incurred if the plaintiff had confined his action to that upon which he recovered, *e. g.*, instructions to defend, attendance to draw a jury, attendances upon the examination of witnesses to the extent to which they were necessary in support of the plaintiff's successful claim, and so forth.

The case of *Myers vs. Defries*, 5 Ex., p. 185, is instructive upon these points, where Bramwell, C. J., remarks "the plaintiff will be entitled to recover all those costs which have been incurred in producing the result in his favour; the defendants will get all costs of resisting those parts of the plaintiff's claim which has been defeated."

In taxing costs of an action in which there are several distinct claims differing in character, and which result in distinct

and separate issues and events, the costs should be treated distributively.

Thus, in this action, "instructions for statement of defence" and "statement of defence" are to be allowed to the defendants upon the issues in which they succeeded; and the amount of fee allowed should be regulated by the greater or less magnitude of the issue.

The scale is elastic for the purpose of just adaptation, and the master will use his discretion accordingly.

I apprehend that there is no question of the delivery of the *postea* under the new practice. Either party may require the entry of judgment in the mode prescribed, and the clerk of the court is bound in all cases to make a memorandum of every judgment upon every issue; and in England, indeed, the officer has to do more than this; it is his duty there to enter the judgment, and not merely a memorandum.

I have marked with an asterisk those items of the taxed bill which appear to me to be not allowable; and I have made a note or two upon other items for the master's consideration.

The bill should go back to the master for reconsideration.

HARVEY v. HUNT, TRUSTEE.

1892, *July*. BY THE COURT.

Guarantee—Property mortgaged to secure amount guaranteed—Insolvency of mortgagor—Right of mortgagee as against insolvent's trustees.

Where the plaintiffs had gone security to a bank for an advance to be made to a third party, taking as security under a mortgage for "three years, or so long as credit should be continued in force," certain properties. The mortgagor becoming insolvent the trustee claimed that the mortgage was ineffectual, and that it only contained an interest for three years, beyond which the credit had gone.

Held—It was not intended that security should expire within three years, but that it should continue until the guarantee was redeemed and terminated. The words "continue in force" must be held to mean so long as the plaintiffs are liable on their guarantee.

THE plaintiffs set out that they are mortgagees, under assignment, from Robert Barnes and Jessie Barnes, lately trading under the firm of "Barnes and Co." of certain lands, chattels and shares described in the conveyance and "in the document accompanying the indenture," to hold to them (the plaintiffs)

"for the space of three years from the date hereof, or so long as the credit at the Union Bank shall be continued in force."

The conveyance was executed in June, 1886, and is admitted to have been duly registered.

It is expressed to have been given and executed "for and in consideration of a credit having been established at the Union Bank of this city by the aforesaid Harvey & Co. for the aforesaid Barnes & Co.

The credit thus established was given upon certain written guarantees from the plaintiffs, the first of which, addressed to the manager of the Union Bank, is as follows:—

"We have to request that you will give Mr. Robert Barnes a credit for one thousand pounds sterling for six months from this date, for which we will be responsible."

This guarantee was renewed from time to time, and on the last occasion in August, 1889, when Mr. Harvey wrote: "Poor Barnes asks me again to renew his guarantee, and under the circumstances I will ask you to let him overdraw for the present as during past month or two, and I will be responsible for repayment of principal and interest."

In March, 1891, Jessie Barnes and Robert Barnes assigned to the defendant, Hunt, for the benefit of creditors.

At this time the credit established by the plaintiff for Barnes and Co. at the Union Bank had been considerably exceeded, and the Bank claims to be indemnified by the plaintiffs to the extent of their guarantee of \$4,800 (£1000 stg.), and the plaintiffs claim that an account may be taken, and on failure of payment of the sum found to be due to them by Barnes & Co., that the above recited mortgage be foreclosed.

The defendant trustee claims that the plaintiffs are not liable to the Bank as guarantors; that the credit was not in force, and that the alleged mortgage is, in its terms, now ineffectual as a conveyance by way of security to the plaintiffs; that its only effect was to convey an interest in the various properties assigned, of only three years, which have expired.

There is no doubt that the assignment is worded in a very extraordinary manner, and that it is difficult to attach any sensible meaning to the conditions of tenure.

That it amounts to an assignment of certain properties and of their maniments of title is clear enough, but the defeasance or condition attaching to the conveyance is well nigh incomprehensible.

The document, no doubt, is intended as something to secure

or indemnify the plaintiffs against any loss which may arise from their guarantee to the Bank.

The words are "to have and to hold the same for the space of three years from the date hereof, or so long as the credit at the Union Bank shall continue in force."

After giving the best consideration to the entire transaction and to these terms, I have come to the conclusion that it was not intended that the security should expire within three years, but that it should continue in force for that time, or for any longer or shorter time that the credit was continued by the bank on the plaintiffs' guarantee; in other words, until the guarantee was redeemed and terminated. That the words "be continued in force," must be here held to signify, so long as the plaintiffs are liable upon their guarantee, by its being in force against them.

It must, therefore, be held that such properties as were effectively conveyed, and to which the legal title may now continue in the plaintiffs under the assignment, cannot be redeemed until and unless their liability under the guarantee shall be discharged; and that, if necessary, an account be taken of the amount which the plaintiffs have paid, or to which they may be liable under the credit which they established for Barnes and Co. at the Union Bank.

The difficulty in this case having arisen from the peculiar and very uncertain terms of the assignment under which the plaintiffs claim, they will have judgment without costs.

Mr. Johnson, Q. C., for plaintiffs.

Mr. D. Browning for defendant.

1892, November. HON. MR. JUSTICE LITTLE.

Complaint under Crown Lands' Act—Obstruction to highway—Dedication—Public user.

On the trial of a complaint under the Crown Lands' Act for obstruction to a public cove or highway, it appeared that the defendants claimed to own the land, and that, although the public had used the same for a number of years, there had never been any dedication to constitute a user by the public.

Held—That the open user by the public of a way as of right raised a presumption of the existence of the public right, and when such user is proved the onus lies on the person who seeks to deny the inference from such user to show that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed.

THE proceedings in this matter were instituted under the provisions of "The Crown Lands' Act" by the Surveyor General on the part of the Crown in the month of November last. The complaint embodied in the summons granted by me asserted the right of the Crown to certain land situate in the town of Harbor Grace, and bounded on the north by the main street, on the south by the sea, on the east by the lands of Kean's estate, and on the west by the property of Devereaux's estate; and charged the defendants with being wrongfully in possession thereof, and of having enclosed it and used it for their own purposes. The defendants, in their statement of defence, assert their possession by their tenants of the land so described, and that such possession exists by them and with the knowledge and consent of the relator or plaintiff, and under an agreement by which he authorized them to enclose the said land for their own use and purposes. From the statements of counsel, and the oral and documentary evidence adduced by the parties, it appeared on the part of the Crown that the piece of land in question, and generally described in the order or statement of claim, was and is claimed to be public property. This land is more particularly described and its boundaries are admitted to be correctly and particularly defined, on and by a plan offered in evidence by the relator and marked G. M. By this plan it would appear that the pink coloured space thereon indicates a part of the disputed land, and another space, coloured blue, marks a public drain or sewer, also alleged to have been enclosed and now held by the defendants. This comprises the land in dispute and extends along the south side of Water street, in the town of Harbor Grace, about thirty-five feet.

On this frontage the *locus in quo* is stated to be bounded on the west by the old wall of Pendergast's house, and on the east by the property of Devereaux's estate, and extending southward to the waters of the harbor.

From the importance of the interests, both public and private, involved herein, it may be desirable to give, in brief, the purport of the testimony of the principal witnesses who were so examined. The first of these, on the part of the plaintiff, was James L. Pendergast, who deposed that he was ninety-two years of age; that he had been a tenant of Kean's estate under a lease obtained in 1853. Having examined the plan already referred to, he stated that the space extending from where his house stood on Kean's estate and Devereaux's property was unoccupied, and the distance from his holding or house to Brazil's lane was about thirty-five feet—this space was always called the public dock; the space extended down to the water, was a public cove, and always used as such for hauling up of boats, &c. There were never any buildings or erections of any kind on it as far back as the year 1832; he knew the local authorities to have exercised control over it and to have protected it from the intrusion of private parties. As tenant of Kean's estate, or otherwise, he never had any part of it enclosed; until the erection of the present public wharf at the foot of Victoria street there was no other public beach or dock, except at this locality. He never knew before these proceedings that Kean's estate laid claim to the place in question, and is positive that for the past seventy years it was always used as a public dock; it was bounded on the west side by Brazil's lane. The counter part of his lease from Kean's estate was in evidence and bears date January 12th, 1853. This side of the lease identified and referred to by the witness, Pendergast, in his cross-examination, came from the custody of the defendants, and on subsequent reference to its terms it was found to contain a provision "that in case the piece of waterside at the western boundary of the said premises, and lately spoken of as a public cove, should be ascertained to be such, no deduction was to be made from the rent on account thereof." This piece of waterside thus referred to would appear to have formed the dock to which reference is made in the evidence, and is situate in the space described as lying between the western wall of Pendergast's house and Brazil's road.

Mr. Drysdale, another witness, showed a much more recent acquaintance and knowledge with the subject-matter in dispute

than the previous witness. He is over fifty-nine years of age, and has lived all that time in Harbor Grace; he knew the locus in question, that is, the land between the western boundary of where Pendergast's house stood on Kean's estate and the eastern side of Brazil's road running down by Devereaux's house. It was, as long as he remembered, a public dock, and was used by the public for general purposes. He never knew any private person to claim it until its recent occupation by some of the defendants. He referred to a plan known as "Page's plan" of the town of Harbor Grace, taken and published in 1857. This, he testifies, correctly shows the place in which the dock is situated; it numbers Devereaux's house as thirty and Kean's estate (Pendergast's house) as thirty-two, and the space between these is the dock or public place in question. Mr. Wills also testifies that he knew the place now in dispute for over fifty years, and during that time there were no buildings or erections on it until last year; the public always used it as a public dock. Mr. Martin, now in his seventy-second year, had lived all his lifetime on the land adjoining the place in question. The land lying between the roadway to the eastward of Devereaux's house and to the westward of where Pendergast's house stood, was always public and used by them at all times for the general public convenience, and no erections of any kind were placed on it. There was some other testimony and certain plans and documents put in on the part of the Crown.

The defendants, in support of their defence, urged, in the first place, that in the year 1828 this very land must have been the property of the Kean's estate, as it formed the subject of division among the claimants on the estate, and was included in a deed of partition made between them by a jury convened by the High Sheriff of Harbor Grace in that year. The western boundary of one of the lots then appropriated by the deed of partition, is described as Brazil's road, and therefore includes this land in dispute—the lease to Pendergast also covered the same piece of property, and after Pendergast's interest ceased, it was rented to Messrs. Munn and Company. The deed of partition executed by the jury was accordingly put in evidence and admitted for what it was worth, and although effectual between the parties to the proceedings then determined by its provisions, cannot be regarded as determining the rights of the public, who were in no way privy to such proceedings or deed, in their claim to the property or rights now in dispute.

Mr. Prowse, who is the administrator of the estates of two deceased parties who hold an interest, and the agent of others interested in this portion of the Kean's estate, recognized the signatures and hand-writing of some of the parties to the deed of partition, and stated he knew the land thoroughly for fifty years, and that Kean's estate, he should say, existed in Harbor Grace for a century. The piece of land marked on plan G. M. as A. & B. are now in dispute, are leased from Kean's estate by Munn & Company, and were formerly under lease to Pendergast. On the lessees fencing the place notice was received, on behalf of the public, from the Surveyor General; with Mr. Mackinson he interviewed the Surveyor General; on informing him he would fence in the place now in question, he (the S. G.) replied, very well, and it was then stipulated that Mr. Prowse was to cover over the water-course or sewer that ran through the place, and could then have the whole of it. This work, together with the fencing, cost Munn & Co. over \$400. To his knowledge the place was never a public cove and never was public property. He did not remember having seen a fence on it running east and west. The property marked A. & B. on this plan had never been fenced, no erection of any kind ever on it up to recently, when the lessees of Kean's estate placed the present erections on it; he did not reside at Harbor Grace. The only other testimony of importance in support of defendant's position in the cause was Mr. Mackinson, who has resided in Harbor Grace for the past thirty-two years, and occupies, as tenant of Kean's estate, land adjoining the piece of land in question, which he fenced a year ago at the instance of Mr. Prowse. Before doing so he and Mr. Prowse had seen the Surveyor General, and after an examination of the plans of Kean's estate it was arranged that Prowse should fence as far as the western side of the drain, parallel to it, and make a substantial drain of stone down to low water, and level up the place so as to abate what theretofore was a nuisance. This was done at a cost of \$200. He never saw any special use made of the land; an old boat or wreck might have been laid there, and it may have been used by the public in the winter as a convenience; it was unfenced and people used it whenever they wished to.

Whatever conclusion, however, we are impelled to arrive at by force of the weight and character of the testimony, we cannot fail to recognize on the argument of defendant's counsel, great care and research in the able endeavour, on his part, to

establish the absolute claim of his clients to the property in question. He may, from his view of the case, be correct in assuming that the Kean's claimed this land, and that it was regarded as part of the estate for a period of years prior to this alleged assertion of the right of the public, that it was with the other property of the estate, the subject-matter of adjudication in a proceeding between Kean's heirs in a court of record in 1828, when by the finding of a jury and the terms of a deed of partition, it was apportioned to Robert Kean, one of the heirs of Kean's estate. And in 1853, it is true, it was leased to Pendergast by and on behalf of those through whom the present defendants claim title.

The learned counsel may also have good reason and ground for the contention, that, legally, his clients are in no way bound by the acts or omissions of their tenants in permitting any part of the land to be used by the public by reason whereof any right of dedication to public use could be assumed or established over the *locus in quo*.

But we have on the other hand the clear, direct and positive testimony of witnesses whose capacity and credibility were not attempted to be impugned, deposing to facts within their own personal knowledge in relation to the disputed land. And from these it must be accepted as a fact, that this property has not been enclosed or built on, or used as the exclusive property of the Kean's for the last thirty, forty, or sixty years; but, on the contrary, it has at all times been open to and used by the public in the manner described by Pendergast, Martin, Drysdale and Wills. It must also be observed, that the proceedings at law for partitioning in 1828 were had solely between the then claimants—the record of such proceedings may be conclusive as to the fact of such finding, and binding on those who were, or are, privy in estate to the parties thereto; but it is not contended such findings can be utilised in other proceedings as evidence of or set up by way of estoppel against parties, strangers to the first proceedings in the assertion of their claims to the same land. Moreover, in addition to the positive testimony to which reference has been made, of the absence of actual occupation for such a lengthened period of time on the part of those asserting a title in fee through the Kean's, we have the provisions in the lease to Pendergast to deal with. By it special mention is made “to the piece of waterside at the western boundary of the premises” conveyed under lease, and in the event of that being ascertained to be a public cove, no deduc-

tion on that account was to be made from the rent reserved under the lease." Now, by the description in the body of the lease, of the land so conveyed to Pendergast, the western boundary is described as a public road called Brazil's, extending to the harbor, consequently the public cove referred to in that proviso must have been situate to the eastward of Brazil's road and between it and Pendergast's holding. Such a position harmonises with the relations and conditions now advanced on the part of the Crown and supported by the evidence adduced. For, by the foregoing stipulation in the lease, the lessors ingenuously acknowledge the existence of a doubt in relation to their own title to the *locus in quo*, or their right to lease it; and this doubt is clearly, to their minds, of such a substantial character as to induce them in fixing the rent to expressly provide that, on its being found to be public property, no reduction in the amount of rent was to be allowed in consequence thereof.

Mr. Prowse, from his point of view, may consider he has good ground and satisfactory reason for believing that this piece of property was regarded as part of Kean's estate for upwards of a hundred years; still we have the established fact that as far back as the memory of the witnesses reaches, and clearly ever since the execution of the lease to Pendergast, it has been vacant and continuously used as a public way and dock. There is no evidence of any obstruction having been raised to this user. The personal representatives of those interested in the estate were resident here, were parties to the lease, and must, therefore, have been cognizant of the public claim to the right of way and dock in question. The contention of learned counsel, that it is indispensable in the assertion and maintenance of such a claim, that the assent of the owners of the land should be evidenced and established, is right in the abstract; but, assuming that it had been conclusively shown that the locus in question originally formed part of Kean's estate, their knowledge of the user and their assent to such dedication may well be inferred from the facts and circumstances on record. On this subject we find it clearly laid down in *Adds. on Torts*, p. 222, "that the open user by the public of a way as of right, raised a *prima facie* presumption of the existence of the public right, and when such user is proved, the onus lies on the person who seeks to deny the inference from such user to show that the state of the title was such that dedication was impossible, and that no one capable of dedica-

ting existed." It is unnecessary in applying this principle or rule of law to the present case to repeat the details of the evidence; the circumstances or facts, however, cannot be overlooked that those who were capable and vested with the power as representing the estate, to execute a lease of the land must be held to have had a knowledge of the title and the condition of the land at the time. They were all, apparently, present and duly represented, and must, even from the language and terms of the lease, have been cognizant of the claim and user of the public to the place in question. It is true, in law, as urged in argument, the assent of the lessee is not sufficient to establish the fact of dedication. Here, however, the party who had held as lessee deposes that for years preceding the making of the lease, this piece of land and waterside had been used by the public as a common way and public dock, and that he never occupied it as part of the property so leased to him by those representing Kean's estate. These statements are made long after the witness had ceased to be a tenant of Kean's, and are corroborated by the testimony of the other witnesses, who must be regarded as standing indifferent to and uninterested in the proceedings, beyond that interest they may have in the matter in common with the public for whose benefit this right is endeavoured to be preserved. On further reference to authority it will be found, as laid down in the judgment delivered in the case of *Davies v. Stephens*, of 7, C. & P., and also in *Adds. on Torts*, "that if the acts of user are notorious, and go on for a length of time, and notwithstanding a change of tenants, it may be presumed that the owner has been made aware of them, and that the right of way was used with his concurrence." Conclusively, then, the documentary and other evidence, the contents of the lease, and also the plans, made disinterestedly and published, before litigation was contemplated, all point to the notoriety of the claim and user in question.

The statement deposed to on the part of the defendants regarding the arrangement entered into with the plaintiff, under and by which the use of the place was, as alleged, secured to them in consideration of considerable work being done by them towards its improvement, might well be accepted as further evidence of the existence in the relator, as the official of the Crown having charge of the public lands, of a right and control over the land in dispute, and of its forming part of the public domain.

In my judgment, therefore, that land situate between the

western boundary wall, described in evidence as 'Pendergast's, on the one side, and Brazil's road on the other, and particularly delineated and defined in the plan on record numbered or marked G. M., and according to the measurements so given, is and must be declared to be public property, and, as heretofore, should be reserved for the uses and purposes of a public way and landing place or dock.

I consider the defendant's claim to be reimbursed the monies (\$200) expended by them in filling up, levelling off and fencing in said land, as they apparently performed this work with the knowledge and under arrangement with the relator, should be favorably dealt with by the Crown.

I shall not determine, at present, on the question of the costs of these proceedings, but reserve it for further consideration.

Mr. Hayward, Q. C., and Mr. Emerson, Q. C., for plaintiff.

Mr. Browning for defendants.

BURKE *v.* WHITE.

1892, November. PINSENT, J.

Licensing Acts—Conviction—Selling liquor without license—Act of servant act of master.

Where the appellant was fined by the magistrate for selling liquor without a license. On appeal, it was contended for him, (1) That the liquor was sold by his wife; (2) That there was no evidence that the liquor sold contained the percentage of alcohol by law required to bring it under provisions of licensing Act.

Held—The act of the wife is the act of her husband; also, that where it is proven that rum was sold a magistrate may assume it was the well-known liquor so described, and that it was over the strength defined by the law.

IN this case the appellant was fined \$50 by the stipendiary magistrate at Brigus for a breach of the License Act, and Mr. Scott, Q. C., who appeared for him, contended that the proof, if any, was of an act of appellant's wife in selling liquor; and the learned counsel also ingeniously adjudged that there was no evidence before the magistrate to satisfy section one of the Act of 1888, which enacts that "the term 'intoxicating liquors' shall be construed to signify ales, wines, malt, brewed or spirituous liquors, containing two per cent. or upwards of alcohol by volume."

As a fact there does not appear to have been any specific proof that the liquor was of the alcoholic strength of two per cent. It is not surprising that the legislature should have expressed its intentions in a manner calculated to embarrass its meaning. In this case one is almost compelled to yield to the objections taken by Mr. Scott, that, when the legislature declares that "intoxicating liquors shall be construed to *signify*" a given thing, that specific proof of its being that thing must be required.

I have determined, however, (particularly as the defendant raised no objection before the magistrate in disparagement of the alcoholic strength of his liquors), to take the broader view of the question put by Mr. Hayward, Q. C., and to hold that, whereas, in this case the proof is that "rum" was sold, a magistrate may assume that the well-known liquor so described and known to the revenue and other license laws and otherwise, is over the strength defined by the section.

As to the other point, it is in evidence that the accused himself was present in the room when the liquor was served, and therefore I hold the act of his wife or servant to be his act; and if that were not so the law expressly declares (sec. 32, Act of 1875) that sale "by the wife, child or servant shall be considered presumptively as the act of the husband, parent or master."

Let the appeal be dismissed with costs.

MCPHERSON v. BROWNRIGG.

1892, December. CARTER, C. J.; PINSENT, J.; LITTLE, J.

Vendor and purchaser—Covenant for good title—Measure of damages for breach.

Where property was seized by a Customs' officer for breach of revenue law, and it became forfeited and was sold at public auction; the owner afterwards sued the purchaser in trover for the property, alleging that the Crown or Customs' authority had no property in the same, and could not sell the same.

Held—(Pinsent, J., differing)—The right of property and possession was in the Crown. There was a sufficient cause to justify a seizure and consequent forfeiture. Once the property became forfeited the Crown had a sufficient title to sell.

THIS is an appeal from the Central District Court, before which the plaintiff sought to recover *in trover* the value of a

mackintosh coat of the value of \$7. The judge found for the defendant. The amount is small, but the principle involved is of considerable importance, and may at any time apply to property of large value. The question broadly put is whether such an action can be maintained where the property was seized by a Customs' official, under the Customs' Act, for a violation of a provision contained in it, which declares that the property so seized shall be forfeited, and, before proceedings instituted for condemnation, the Customs' authorities sell the property. The defendant was a purchaser, on whose behalf it is contended that, assuming the property had at the time of importation belonged to the plaintiff, yet the breach of the Act or the seizure having created a forfeiture, vested the ownership in Her Majesty, and that the sale, even without condemnation by a competent tribunal, could not operate to revest the property in the plaintiff.

The circumstances in evidence were that the plaintiff, a merchant in St. John's, had imported from England by the steamship *Nova Scotian*, on the 13th October, 1891, among other packages from different shippers, one package, No. 281, containing goods from the "Fore Street Warehouse Co.," of which the plaintiff had received an invoice, at the bottom of which, below the total of the figures £28 19s. 6d., was written "1 parcel enclosed from Foster, Porter & Co., value £6 8s. 8d." The plaintiff had also received from the same firm an invoice of the only goods he had ordered from them, which amounted to £9 6s., and they were all of which he had knowledge, not having received any communication from the shippers respecting the £6 8s. 8d., concluded the goods that represented that amount were contained in the £9 6s. invoice, cut off the memo. of £6 8s. 8d., sent copy of the invoice to the Customs, and made entry by one of his employees for duty in the usual manner less that sum, on which the warrant for unshipment was granted. On that day plaintiff's buyer (O'Flannigan) in the British markets was sick at his home, and the entry had to be made without delay. The landing waiter happened to select, out of the packages for examination in the warehouse, numbers 281 and 37, which were detained for that purpose. Next day O'Flannigan returned to his business and informed plaintiff for the first time that he had received a letter with an invoice of rugs and a mackintosh coat directed to him, which he had requested to be forwarded, amounting to £6 8s. 8d.; that plaintiff had no knowledge of this, and the latter testifies that it

was the first invoice of imported goods since he had been in business that was not directed to him. When made aware of this circumstance, plaintiff sent O'Flannigan at once to the Customs' officials to explain it and amend the entry, but they declined to do so. It was not until the 17th the package was opened and the contents found as O'Flannigan had informed the officials, the mackintosh with the rugs being on one side in a separate parcel. Nothing had transpired until within three or four days before the 30th November, when plaintiff, meeting the Receiver General, inquired about the package, was referred by him to the landing waiter, with whom and the assistant collector he then spoke, when they agreed there was nothing in the matter worth reporting, and he says "he concluded it was all right." The Receiver General states this conversation with plaintiff was on the 2nd December; he knew through the department the goods were seized on the 17th October, and were confiscated by the Board of Revenue on the 27th November. Two days before the letter of the 30th November was received from the assistant collector the goods were advertised for sale at auction, and no notice had been given to the plaintiff in the meantime. In that letter he was informed "*that the Board of Revenue had your case before them, and that on examination they find that a gross attempt has been made to defraud the revenue, and that for such offence they have decided on confiscating such goods, and that you be fined in the sum of one hundred dollars. I have, therefore, to request your immediate attention to this matter, or otherwise it will be placed in the hands of the Attorney General for settlement.*" The goods were sold, and at the time when defendant became purchaser of the mackintosh he was notified that the plaintiff would claim it as his property. On the 15th December plaintiff acknowledged receipt of the above letter, and gave the assistant collector, and through him to the officials of the Customs, notice that he claimed the goods as his property, and as having been unlawfully disposed of.

The section of the Customs' Act under which the seizure was made is the 26th, bearing on this are the 78th and 80th sections, as follows:—

XXVI.—No entry or warrant for the landing of any goods, or for the taking of any goods out of any warehouse shall be valid, unless the particulars of the goods and packages in such entry shall correspond with the particulars of the goods and packages purporting to be the same in the report and manifest

of the ship, or in the certificate or other document, where any is required, by which the importation or entry of such goods is authorized, *or unless the goods shall have been properly described in such entry by the denominations and with the character and circumstances according to which such goods are charged with duty or may be imported ; and any goods taken or delivered out of any ship or out of any warehouse, by virtue of any entry or warrant, not corresponding or agreeing in all such respects, or not properly describing the same, shall be deemed to be goods landed or taken without due entry thereof, and shall be forfeited.*

LXXVIII.—All vessels, boats, goods, and other things which shall be *seized as forfeited* under this Act, shall be deemed and taken as condemned, and may be dealt with in the manner directed by law in respect to vessels, boats, goods, or other things seized and duly condemned for breach of the provisions of this Act, unless the person from whom such vessels, boats, goods, and other things *shall have been seized*, or the owner of them, or some person authorized by him, shall, *within one month* from the day of the *seizing of the same, give notice in writing* to the person or persons seizing the same, or to the officer in charge of the nearest port or district, that he claims the said vessel, boat or goods, or other things, or intends to claim them.

LXXX.—All vessels, boats, goods, and other things seized as liable to forfeiture under this Act, shall be forthwith delivered into the custody of the officer of the port where the same shall have been seized, or of such other port as the Receiver General or assistant collector may direct ; and such officer, after condemnation of such vessels, boats and other things, shall cause them to be sold by public auction to the highest bidder : provided that the Board of Revenue may order such vessels, boats, goods and other things, or the proceeds of such sale, to be restored in such manner and upon such conditions as they shall think fit.

The requirements of the Act were not complied with, and although there would appear to have been no fraudulent intention in the omission of these goods in making the entry or in evading the payment of duty, by giving credit to the sworn and uncontradicted testimony of the witnesses, yet in law there was, I apprehend, a sufficient cause to justify a seizure and consequent forfeiture, as the circumstances at the time appeared, the entry being invalid under the 26th section. The plaintiff was bound by the 78th section to give one months' notice of his intention to claim the goods from the day of seizure, other-

wise they would be regarded as condemned, but it should have been shewn that he had knowledge of the seizure, and there is no evidence that he had such until he received the letter referred to from the assistant collector when he was informed of the confiscation. As to knowledge being a necessary ingredient in penal proceedings, see *Wilberforce on Statutes*, page 254; the detention for examination was not seizure, see *Jacobsohn vs. Blake*, 6 M. & G., 925, where, in an action of trespass against customs' officials for seizing goods, Tindal, C. J., observed in giving judgment, "there must have been an actual seizure of the plaintiff's goods, but the evidence here was all the other way, and went to show that the defendants merely took possession of the goods in the execution of their duty as Custom House officers for the purpose of examination," and in this ruling all the judges concurred. All Acts that impose public burdens or charges are to be construed strictly, while any exception that confines their operation is to be construed liberally, *Wilberforce*, p. 244 and note (d). Besides the conversation as given above between the plaintiff and the Customs' officials, I am clearly of opinion the notice of claim was in law given within the time required to save condemnation, and the authority to sell can be exercised only after condemnation. To effect that object proceedings should have been instituted in the courts mentioned and as provided for in the 114th section, and there were none. The Board of Revenue is constituted under chap. 48 of the consolidated statutes, by which, so far as concerns this question, it is enacted,—“they shall direct and carry on prosecutions for seizures, forfeitures, penalties, and breaches of revenue law, over which they shall have a general control; they may remit penalties in whole or in part, and direct the restoration of property seized or the proceeds thereof, &c.” There was manifestly an unlawful assumption of authority by the Board, and, if such did exist, there was an abuse of it in subverting the principles of justice in this matter. The Act not only does not confer on them the power to confiscate or impose a penalty, but expressly mentions the courts which shall possess the jurisdiction, and all this is usurped without any notice of the proceeding to the plaintiff on *ex parte* information without oath, and yet the Board has undertaken to pronounce confiscation of the property, impose a penalty and charge the plaintiff with a gross attempt to defraud the revenue. Even with the members of a London club regarded as a *quasi* judicial body, as is the Board of Revenue,

the courts have issued an injunction to restrain expulsion unless notice had been given to the member of the specific charge of misconduct and the opportunity of being heard.—*Fisher vs. Keane*, 11 C. D., 352; *Labouchere vs. Earl of Wharncliffe*, 13 C. D., 346.

The Customs' officials cannot be too vigilant in guarding the public revenue, and when they confine themselves to their sphere of duty will be sustained by the courts as they ought to be, but when they overstep it, they must be plainly told of their error and submit to the consequences. The question now remains whether this appeal is to be sustained or dismissed, and to arrive at a determination we must ascertain to whom belonged the ownership of the property and the right of possession at the time of the alleged conversion by the defendant. The plaintiff contends the unauthorized sale re-vested the property in him, even assuming that before then it belonged to Her Majesty as having been forfeited. But can this be so? In the recent case of *Pitts v. O'Dwyer*, which arose under the Customs' Act, this court, after much deliberation, held in conformity with the decisions cited in the judgment, that forfeiture accrued before seizure and before the institution of any suit or proceeding for condemnation at the time the illegal act was committed, and that it divested the property out of the previous owner. I did not pronounce the judgment, but before pronounced I had carefully examined the authorities applicable to the circumstances, and concurred. If this ruling be correct in law, and no reason has been advanced or case cited to sustain a contrary opinion, then both the right of property and of possession were in the Crown. . . . An owner may part with the possession temporarily to another, as by hiring or depositing, which would constitute what the law denominates a bailment, and the right of possession would for the time be in the bailee, who as special owner could alone maintain trover against any person who may have taken the goods and converted them to his own use, but if he should convert the goods so bailed to his own use, such as by a sale, he would by that act have determined the bailment, and the right of property would draw to it the right of possession so as to enable the owner to recover damages in trover. *Cooper vs. Killomatt*, 1, C. & R., 672; *Johnston v. Itar*, 15, C. B., N. S., 330; *Pigot vs. Cubley*, *Id.* 701. Counsel for the plaintiff contended that the same principle applied in this case, as the sale restored the right of property and gave the right of possession. But there

is an essential difference between the two positions, one party only can be the owner.—*Williams on personal property*, (338). In the cases cited the bailor was the owner at the time of the wrongful conversion as was Her Majesty at and from the time of the forfeiture. There was no bailment and no mere right of lien which, when the goods were parted with, became lost. The principle relied upon by the plaintiff did not re-vest the *property* in the bailor as it was his throughout, but it did *the right of possession* from the wrong committed. See *Halliday v. Holgate*, 3, L. R., Ex. 299, where a sale, wrongful as regards time, of pledged shares, yet the immediate right of possession was not re-vested, and plaintiff could not maintain trover, either for the whole value or nominal damages. In *Scott v. Shearman*, 2, W. Blackstone, p. 980, which was an action of trespass against revenue officers, the eminent jurist, Sir W. Blackstone, in his luminous judgment, declares the law to be: "The spirituous liquors that were seized were, therefore, at the time of the seizure, the goods and chattels of Her Majesty, and not of the plaintiff, as in his declaration he has (necessarily) declared them to be, since neither trespass or trover will lie for taking goods unless at the time of the taking, the property was in the plaintiff, "or at the time of the alleged wrongful conversion, 2, *Smith*, leading cases, 87. How then can the plaintiff claim in this case that he has been wrongfully deprived of his property by the defendant? Had there been proceedings for condemnation, as it was the duty of the officer named for that purpose in the Customs' Act to have instituted where there was a claim, as is laid down in the case *supra*, "the very seizing of the goods is notice to the claimant and an undertaking to proceed to condemnation according to the rules of the court (exchequer)," in this case under the statute.

The effect of a judgment of condemnation would have been the vesting the property irrevocably in the Crown which would have a retrospect and relation back to the seizure. A meritorious claimant, by the default of the officer in not prosecuting, would appear not to be deprived of a remedy if so advised in adopting a similar course to that taken by the claimants in *Prince v. the Queen*, P. C., *app. cas.*, p. 1, where the proceedings were commenced by him by monition in the Vice-Admiralty court of the colony, after which the Crown filed an information or libel, and the matter went on to judgment. In actions against revenue officers in England concerning matters of revenue, the court of exchequer, (the jurisdiction of which is pos-

essed by this court), claims the right of adjudging, and as a privilege of the officers, and when an action is elsewhere commenced, it will on motion, be removed. *Attorney General v. Kingston*, 8, *M. & W.*, 163; 1, *Anstruther*, 205, in which will be found an elaborate judgment of Eyre, C. J., on this subject.

This action, however, is not against a revenue officer but a purchaser without collusion, and having due regard to all the circumstances, I feel, after the best consideration, that I have no option, and am bound to maintain what I consider to be the solid principle of law involved apart from all technicality, and adjudge that this appeal be dismissed, but under the circumstances, without costs.

HON. MR. JUSTICE PINSENT:

This is an action brought by the plaintiff in the District Court, to recover from the defendant \$7, the value of certain goods purchased by the defendant at a Custom-house sale of goods alleged to be forfeited under the Customs' Management Act. The plaintiff contends that the property in question was not forfeited, and was illegally seized and sold, and he brings this action to test these questions. The defendant rests his claim upon title derived under the authority of the Customs; and his title is defended by the Receiver General and other officers of that department. But for, as I hold it to be, the *tortious* conversion of the goods in the teeth of the statute, by which the property was taken out of the custody, control and due course of law, I think that upon the principle of the authority of *Cawthorne v. Campbell*, cited in 1, *Anstruther*, p. 205, this court, in virtue of its Exchequer jurisdiction, would, upon application, stay the trial of such an action as this in the court below, and require the parties originally to test in this court the question of title, and the validity of the proceedings of the Customs. But here all parties have gone into the merits of the action in the court below and submitted them in the first instance for adjudication there, so that on appeal the case is practically before us to deal with on the merits as effectually as if it had been originally taken and heard here.

I had, previously to the late great fire in St John's, bestowed a great deal of pains upon the consideration of this case, and I had prepared a judgment very fully setting out the entire facts, and the law which it was our duty to apply to them. I shall content myself now with a much shorter review of this case,

particularly as I find that the learned Chief Justice, from whom I have here the misfortune to differ in opinion, has set out everything at large in his judgment, which was not as mine was, lost in the fire.

After giving full consideration to the evidence, I can discover no justification for imputing fraud to the plaintiff, nor do I believe that if this case had come before us in the form of an information or indictment for instance, for trial by jury, that fraud would have been found. To arrive at any other conclusion we should have not only to discard the plaintiff's own evidence, but that of Mr. Flannigan, which confirms it in all essential particulars; and to disregard the uncontradicted evidence of the statement of the Custom House officers that they saw nothing in the transaction worth reporting against the plaintiff. It will be borne in mind that it was by Mr. Flannigan the plaintiff became apprised of the mistake he had made, which was then immediately corrected; and that it was from Mr. Flannigan the Custom House officers received the first information of the parcel being in the case at the landing warehouse. Prior to the removal and examination of the case at examining warehouse, and immediately upon the discovery of the plaintiff's mistake, and within two days of the arrival of the goods at this port, entry was tendered at the Custom House for this additional parcel.

I think the evidence in this case fails to sustain any seizure at all, in the sense of the statute, of these goods as forfeited. There was a *sale* of the goods as *confiscated* under illegal proceedings of the Board of Revenue. Thus the only proceedings which can be construed into such a seizure, followed a pretended adjudication by the Board of Revenue, at which the plaintiff was afforded no opportunity of being heard, and in the assumption of a judicial power which this court has more than once warned the Customs authorities and the Board of Revenue, that they do not possess. But assuming that there was a seizure at that time of the *goods as forfeited*, the plaintiff gave notice in writing of his claim to them under the 78th section of this Act.

It has been suggested that with regard to suits against officers of Customs for anything done under the Act, there are certain modes of procedure and limitations prescribed; and this is perfectly true; but I can discover nowhere unless it may be in cases under the section just cited, and *where notice has not been given*, that a rightful owner who has not forfeited his goods,

loses his right of property in them. I do not think it can be successfully contended that if, for instance, goods had been seized as dutiable which were exempt, or where they had already paid duty, or mistake was made as to their identity, any Custom House sale could give to a purchaser a right of property in them, or preclude the owner (who had given notice) from recovering them.

Under the 80th section of the Customs' Management Act, goods seized as liable to forfeiture are subject, "after condemnation," to be sold by auction to the highest bidder, and the condemnation in question means judicial sentence after adjudication by a competent court. The exception to this (and it requires very express words in a statute to make such an exception, and thus to derogate from the ordinary right of property), is when the owner shall not give notice within a month of the *seizure of the goods as forfeited*, a seizure, if it ever took place in this case, being that in virtue of the illegal proceedings by the Board of Revenue; for within two or three days prior to this, the examining officers had declared there was nothing worth reporting, and here there is no dispute as to a notice having been given of the owner's claim.

Again, the goods, the subject of this suit, are admitted to have been at the time of the amended entry in, not the *examining*, but in the *landing* warehouse, and thus under the 30th section of the Act, they were "deemed to be on board the importing steamboat," and of such the section provides that due entry shall be made within six days from the time of their being deposited in the warehouse. Here the entry was made within two days. I am, on the whole case, of opinion, that the goods were wrongfully sold by the Customs' authorities, and that, by virtue of such a proceeding, the owner could not be divested of his title, nor could any right of property against the owner be conveyed to a purchaser.

I have listened with much pleasure to the able and elaborate judgment of the Chief Justice, in which I seem to find a vast deal to support the opposite conclusion to that at which he has arrived, and in support of the position I hold; and I would particularly observe that the case of *Pitts v. O'Dwyer*, tried by me, was one in which the wilful breach which produced the forfeiture was undoubted, and in which the notice of claim given by the owner in this case was wanting, and in which there had been a legal seizure of the goods as forfeited.

HON. MR. JUSTICE LITTLE:

These proceedings were brought before this court upon an appeal from a judgment rendered in the Central District Court against the appellant, C. MacPherson, in favor of the defendant, G. Brownrigg, in an action of trover for the recovery of the value of a mackintosh, valued at \$7.

From the circumstances connected with the history of the action, and from the contents of the record, it would appear that the appellant, on the 13th of October, 1891, imported by the steamer *Nova Scotian*, from Liverpool, a number of cases of dry goods. Immediately on their arrival his agent, at his instance, attended at the Custom House with the invoices of the contents of these cases, passed entries, paid the duties on the goods so invoiced, and obtained permits for the landing thereof. From the cases landed, without any pre-arrangement or order of selection, two were selected at haphazard from the whole number, and marked by the landing waiter, White, for examination at the Customs' Examining Warehouse. One of these cases was numbered 281, and on its subsequent examination on the 15th October, by Mr. Jardine, the Customs' Examiner of goods and invoices, he found in it a parcel, of which no mention was made in the invoice, and for which no entry had been passed or duties paid. This parcel contained, among other articles, the mackintosh in question. The invoice accompanying the entry of these cases was found by Mr. Jardine to have been mutilated, having had a part torn or cut off it. The goods in the parcel were seized as forfeited under and by force of the terms of the 26th section of our Customs' Management Act; the contents of the cases, with this exception, passed after their examination into the possession of the importer. The invoiced value of the goods in this parcel was £6 8s. 8d. stg. On the day after the passing of the entries and the removal of the cases to the warehouse for examination, the plaintiff made an unsuccessful application to have his entry of the previous day amended. It then appears that beyond some inquiries and conversations in relation to the entry and goods had by the plaintiff with the Customs' officials, nothing of moment transpired, nor was there any further action taken about the seizure of this parcel of goods until the meeting of the Board of Revenue on the 27th November. At this meeting of the Board, it is alleged, the subject was considered, and it was determined the goods so seized and forfeited should be sold on the 28th of November,

and a fine of \$400 should be imposed on the plaintiff. In pursuance of this determination the goods were put up at public sale, and the defendant became the purchaser of the article, the subject matter of this action. At this sale an agent of the plaintiff was present and warned parties against purchasing, as the goods were claimed to be the property of the plaintiff and were being unlawfully disposed of.

On the 30th of November the following notification was given to and received by the plaintiff from the Assistant Collector of Customs :—

“SIR,—I am directed by the Board of Revenue to acquaint you that they have had your case, in the matter of enclosure of goods, ex steamship *Nova Scotian*, from Liverpool, in October last, before them, and that on examination they find that a gross attempt has been made to defraud the revenue, and that for such offence they have decided on confiscating such goods and that you be fined in the sum of \$400. I have, therefore, to request your immediate attention to this matter, or otherwise it will be placed in the hands of the Attorney General for settlement.

“I have, &c.,

“(Signed), J. L. NOONAN, *Assistant Col.*”

This was replied to by the plaintiff on the 15th December, as follows —

“Referring to your letter of the 30th ultimo, I hereby give you, and the officers of the Customs acting under you, notice, that I claim and intend to claim the said goods as my property, and as having been unlawfully disposed of,

“(Signed), C. MACPHERSON.”

In addition to the foregoing statement of facts, it must be observed, as explanatory of the circumstances connected with the entry so made and with the mutilation of or apparent tampering with the invoice furnished by the plaintiff to the Customs, that the plaintiff, as deposed to by him, was not aware of the parcel being in the case so selected for examination until the day following the entry of the goods. That by the same steamer conveying the goods he had received among his invoices a note from Foster & Co., one of the parties from whom his buyer purchased, of an enclosure from them, valued at £6 8s. 8d. stg., and had also received from them an invoice for £9 6s., and having no particulars or bill or invoice of the former amount, he supposed and concluded it was included in the latter, and removed the note relating to the enclosure from the invoice on which it had been entered, and made his entries at the Customs accordingly. This was done in the absence of

his buyer, Mr. O'Flannigan, who had been too ill to attend at plaintiff's place of business on that day; but on the morning following, when plaintiff was informed by Mr. O'Flannigan of the circumstances connected with the enclosure, and that the invoice of its contents had been addressed to Mr. O'Flannigan and received by him on the day before; he (the plaintiff) directed Mr. O'Flannigan to attend at once at the Customs to amend the entry in accordance with the facts. But as the entry had already been made and the duties paid on the contents as particularized in the invoice then furnished, and the cases having been removed to the warehouse for examination, the Customs declined to correct the error or vary the condition in which the proceedings stood towards the department. It was further stated in evidence, on the part of the plaintiff, that he had been given to understand from the officials, that owing to the insignificance of the affair it would not be further proceeded with. Under these circumstances, it was contended at the argument in support of the grounds of appeal, that from the evidence, it was clearly apparent that no intention existed to defraud the revenue, and the Customs, on being so promptly informed of the error they committed in making the entry, and in view of the instant action of the importer to amend it, should have acceded to the application, and were not justified in proceeding to a seizure of the parcel contained in case 281. That this act of *seizing* did not work a forfeiture of the goods and no right other than that of mere possession was thus acquired by the Crown. It was also urged there was no intended violation of the provisions of the Customs' Act. The absence, moreover, of any notice to the plaintiff of the seizure or subsequent proceedings, as required by law, together with the unauthorized condemnation of the goods by the Board of Revenue, voided the sale, and the possession of the goods having passed into the hands of others, it was argued that the rights thereto unquestionably reverted to the plaintiff.

This history of the proceedings briefly but sufficiently defines the grounds relied on by the Crown in support of the right of defendant to the chattel or article in question, and also those on which the plaintiff rests his claim to its possession or the value thereof, as sued for in the court below. Although the amount sued for is comparatively trifling, still the determination of the issues and contentions raised in the proceedings attaches to it considerable importance by reason of the effect the adjudication may have on the business relations of others

in the trade, as well as the plaintiff, with the Customs' department, and also on the exercise and discharge of the functions and duties of the officials entrusted with the conduct and management of this—the most important branch of the public service.

There does not appear to be any conflict or contradiction in the evidence presented on the record on the part of those interested in the case, and so far the facts rest within a small compass and are clearly and satisfactorily set out. To the issues and incidents thus presented we have, therefore, to apply the provisions of our statute regulating and relating to the Customs in order to determine, in the first place, the position of the plaintiff towards the Crown, and then to dispose of the question of his right to sustain these proceedings as against the defendant.

Now, the first document marked A. among the exhibits in evidence is the Customs warrant No. 705. In it are particularized the cases there numbered 281 and 37, subsequently selected as stated for examination out of the large number then reported by the plaintiff. At foot of this warrant is the statutory declaration, solemnly made by the agent of the importer, and by which the latter is expressly bound "that the articles mentioned and contained in the entry set out in the warrant are of the value so declared, and are thereupon tendered for the payment of the duties to which they are subject." The invoice of the goods or the bill of entry, on which the warrant was made and entry passed, were required by the terms of the Act 45 Vic., cap. 6, to set out "the number of packages, the contents of the cases, as well as the quantity and quality of the goods so reported, for payment of duties." Furthermore, by the 26th section of this Act relating to the Customs, it is expressly provided that no entry or warrant for the landing of any goods . . . shall be valid unless the particulars of the goods and packages in such entry correspond with the particulars of the goods and packages purporting to be the same on the report and manifest of the ship . . . or unless the goods shall have been properly described in such entry by the denominations, and with the character and circumstances according to which such goods are charged with duty or may be imported; and any goods taken or delivered out of any ship or warehouse, by virtue of any entry or warrant, not corresponding or agreeing in all such respects, or not properly describing the same, shall be deemed to be goods landed or taken without due entry

thereof, and *shall be forfeited*. Then again, we find by the 76th and 78th sections of the Act, that all goods liable to *forfeiture*, shall be and may be seized and secured by any officer appointed under the Act; and all goods and other things which shall be seized as forfeited *shall be deemed and taken* as condemned, and may be dealt with in the manner directed by law in respect to . . . goods or other things seized and duly condemned for breach of the provisions of this Act, unless the person *from whom* such goods shall have been seized . . . shall, within one month from the day of seizing, give notice in writing to the person seizing the same, that he claims the goods or things, or intends to claim them. Finally, in relation to this particular and most important part of the case, we find the 80th section of the Act sets out that the goods seized, as liable to forfeiture, shall be forthwith delivered into the custody of the officer of the port, &c., . . . and such officer, *after* condemnation of such goods, shall cause them to be sold by public auction; provided the Board of Revenue may order such . . . goods or the proceeds of such sale, to be restored in such manner and upon such conditions as they shall think fit.

Before proceeding to deal with the application of these provisions to the matters in question, it must be observed that from the uncontradicted evidence of the plaintiff and Mr. O'Flannigan, there would appear to be no sufficient justification for the imputation of fraud cast on conduct of the plaintiff in connection with the mutilation of the original invoice. The conclusion to be drawn from this evidence is that from accidental circumstances, and without the slightest intention to defraud, the plaintiff removed from the foot of the invoice the note making reference to the package contained in case 281. Certainly the discovery of the cutting from the invoice, and the subsequent application by the plaintiff to amend the report or the entry after it was known that the case had been selected for examination, naturally and reasonably impressed the officers with the belief that a fraud was intended to be committed.—The sworn statements of MacPherson and O'Flannigan, however, subsequently made at the trial, sufficiently removed this impression and save the necessity of making the charge of dishonesty so broadly pronounced against the plaintiff in the judgment on record before us. We have, however, to deal with the incidents as they arose preceding the seizure, and it is admittedly a fact that the parcel subsequently found in case 281 had not been reported, no entry had passed for the goods.

it contained, and no duties had been tendered or paid for or on account of them, at the time the cases were passed at the Customs. They were, consequently, not mentioned in the warrant, nor intended to be covered by the declaration in proof of the contents of the case. On opening and examining the case, Mr. Jardine found the parcel and thereupon it was seized as forfeited.

These circumstances must be regarded as sufficient in themselves to warrant the seizure and to justify the officer in acting on the belief of an attempt being made on the part of the importer to defraud Her Majesty, see *Attorney General vs. Siddons, 1 C. & J., 224*. The language of the 26th section of the Act is express in its terms, and no way doubtful in its meaning, and distinctly declares that goods landed under such an imperfect entry shall be deemed to be goods landed or taken without due entry, and shall be *forfeited*. From the moment when due entry ought to have been made, and was not made, goods are to be deemed illegally unshipped and subject to the consequences of being so.—*Attorney General vs. Harel, 1 Moo & W., 589*. It is further observed in the judgment of Lord Abinger, rendered in the same case, that goods landed without due entry are clearly unlawfully landed, and, therefore, the non-payment of the duty and the fraud in not making a perfect entry according to the directions of the statute, take the goods out of the protection of the previous clauses of the statute, and leave them in the same condition as if they were landed without an entry at all, and therefore “illegally unshipped.” There is no inconsistency in making such goods liable to forfeiture, and also subjecting to penalties the persons concurring in such unshipping.

One of the consequences then following on such non-compliance with the provisions of the statute was, in the first place, to subject the importer to a forfeiture of the goods “that is, to the loss of all interest in the chattels so affected by it.”—*Srods. L. Diary*. The illegal act having occurred, the forfeiture consequently preceded the actual seizure made by the examining officer, and the property in the goods thus became absolutely vested in Her Majesty. This principle is recognized and laid down as governing in cases of forfeiture and seizure under the Act, and was applied in the case of *Pitts vs. O'Dwyer*, recently adjudicated on by this court. The action and course of procedure of the Customs' department appear up to this to have been perfectly regular. The plaintiff, how-

ever, as he alleges, was not made aware of the seizing until the receipt of the letter from the assistant collector on the 30th November, informing him of the fact and of the condemnation of the goods by the Board of Revenue. Now, before observing on and disposing of the exercise of such authority on the part of the Board, it is necessary to give the purport of the section under which they appear to have acted. Under this, the 78th section, it is declared that all * * * goods which shall be seized as forfeited * * shall be deemed and taken as condemned, and may be dealt with in the manner directed by law in respect to goods or other things seized and duly condemned for breach of the provisions of the Act, unless the person from whom they have been seized * * shall, within one month from the day of seizing of the same, give notice in writing to the persons seizing the same, &c., that he claims the goods or intends to claim them.

Now, under the terms of the first part of this section it may have been assumed or inferred that they then had the right to deal with the goods as if the question of condemnation had been regularly or duly *disposed of by a court* having authority to deal with the subject because of the absence of the notification on the part of the owner, as provided for by the latter part of the section. But it must be remembered that the importer was well known to the department, and could at any moment have been communicated with, and that he deposes he had no notice of any proceedings after the case had been taken to the examining warehouse, and was unaware of the seizure or of any proposed inquiry into or consideration of the subject by the Board, until officially informed thereof by Mr. Noonan's letter of the 30th of November. I consider plaintiff's notice of the 17th December, in response thereto, given in sufficient time to enable him to avail of the rights so reserved to him under the recited section. This being so, it was imperative that the matter should have been otherwise proceeded with. The Board of Revenue, as may be seen on reference to title 14, chap. 18, of the consolidated statutes, are not empowered or clothed with any such judicial or *quasi* judicial authority as that assumed under the circumstances arising in this case. The terms in which their duties and powers are defined clearly state that "they shall direct and carry on prosecutions against parties for seizures, forfeitures and such like, and over which they shall have a general control"; and the 104 section of the Customs' Act expressly designates the courts and tribunals by

and before which such prosecutions are to be conducted. The Board, therefore, should have given notice to and heard the accused, and if no satisfactory explanation could be given, then the course provided for by law should have been adopted for the condemnation of the goods and the prosecution of the party.

Even if the power of adjudicating were statutably conferred on such a Board, the hearing of the charge under the data and circumstances presented in this case, and the determination thereupon arrived at should, in my judgment, if appealed from, be declared null and void. In instituting the enquiry into the offence reported to them by the officers of the service against the plaintiff, the Board should have acted towards him in accordance with the terms and clear intention of the statute and of the ordinary principles of justice, and thereby have avoided the position the course pursued has placed them in, "that of having convicted the plaintiff of a grave offence without having given him any notice of their proceedings or action, and without having afforded him an opportunity of being heard or meeting the accusation brought against him."

Viewing then the notice given by plaintiff as sufficient, the condemnation of the goods and subsequent sale must be regarded wholly irregular and unauthorized.

Now, as against the defendant, it is contended that the effect or result of this irregularity was to re-vest the right of property in the goods in the plaintiff, and that this right entitles him to the possession of the articles so purchased. In this particular form of action I take the rule to be that, to entitle the party to maintain trover, he must have the right of possession, as well as the property, in the goods sought to be recovered. In trover, the allegation set out in asserting plaintiff's claim is that, at the time of conversion he was lawfully possessed of the goods as of his own property. He must show, not only that the goods were his at the time of seizure, but that they continued his property down to the time of their being sold by the Customs.—*Seake v. Loviday*, 4, *Man.*, and *G.R.*, 5, *M. & W.*, 7, *D. W.*, 516. The act of forfeiture arose when the importer omitted to report the goods, furnishing an imperfect entry thereof, and the language of the Act is that any goods not reported shall be forfeited. In the case of the *Annan-dale*, *L.R. & P.D.*, 218, it was held that forfeiture accrued before seizure, and before the institution of any suit, at the time when the alleged illegal and fraudulent act was done,

and that it divested out of the owners the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture. By the forfeiture alone the property was divested out of the owner and became vested in the Crown. And equally well supported is the principle that the consignee or vendee of goods in the rightful custody of Customs' officers has no right to their possession until the duties are paid.—2 *Esp.* 613 in *re Olise, Abbt. on Ship.* 424. This being the position and relation in which the Customs' department stood towards the goods so seized as forfeited, it is, nevertheless contended that by the subsequent irregularities in the proceedings adopted by the Board of Revenue, in condemning and selling the goods, the whole proceeding was rendered illegal and void *ab initio*. If this were so, the re-vesting of the property in the importer would follow as a consequence, and his right of possession and of action would be established, although the duties remained unpaid. In connection with such a position, reference may be made to the following authoritative rulings, illustrating the effect of the adoption of informal proceedings and the commission of irregularities under such or like circumstances. We find that, where a vessel was seized as forfeited under the Navigation Act, but the authorities failed to proceed to her condemnation, and the owner thereupon brought an action for the seizure; it was held that the action could not be maintained as the effect of the seizure was to divest the property out of the plaintiff and vest it in the Crown.—*Williams vs Despard*, 5 T. R. 2 Wm. Bl.; *Scott vs. Sharman*, 6 M. & G., 919. In *Rodgers vs. Parker*, 18 2 B., Jervis, C. J., says a subsequent irregularity is not to make the distrainer a trespasser *ab initio*. For the original taking there is no action; the distrainer is to be considered as being in possession of the goods notwithstanding a subsequent irregularity.

It may be that any reference, by way of analogy, to proceedings relating to or bearing on the rights to parties in questions arising on the bailment or pledging of goods and chattels, can have little or no bearing on the class of cases to which this belongs. Inasmuch as the rights of the Crown and the liabilities of the public in matters of our Customs' revenue are principally founded on the positive and express enactments of the legislature. And in these cases it is incontrovertible that, when forfeitures of this character arise or are incurred, the vesting of the property accrues instantly to the Crown. This

principle, as observed, is well defined, both in old and recent reports of adjudications on revenue cases. Detailed reference to these need hardly be made; but it will, for instance, be found that even by subsequent proceedings at the suit of others for the seizure of the same article as a droit of the admiralty or otherwise, the Crown will not be divested of its rights previously acquired by forfeiture or seizure—rights which previously accrued to it through forfeiture of the article under the revenue laws,—*Park, 273; Chitty on Prero, 226*. On reference to the case of the *Attorney General vs. Norsledt, 3 Pies. Reports*, it will be found that the opinion of Lord Thurlow is quoted with approval, “that a sale of the article forfeited, even in market overt, would not alter the property as to bind the Crown. The forfeiture and right of seizure being clearly established, the changed character of the rights of property is thus distinctly recognized and rigidly sustained in all such cases brought within the provisions of the revenue and customs’ laws.

I may here be permitted to note that much has been stated in reference to the promptitude with which the importer acted on discovering from Mr. O’Flannigan the history of the parcel; but it must be observed that, being doubtful about the identity of the parcel, he might have obtained a “sight entry,” and then, whilst his cases were in the examining warehouse, he might have had his doubts determined. But having entered and paid his duties, he was bound by the result, and officials lawfully exercised their rights on the discovery of the parcel in seizing the goods contained in it as forfeited. If they had pursued any other course they would have been derelict in the discharge of their statutable prescribed duties. The forfeiture of the goods in the first place, and the seizure thus made, operated in vesting the property, and, as a consequence, the right of possession in these goods in the Crown.

It was forcibly urged, in argument, that on being so reliably assured of the mistake made on passing entries, a rectification should have been permitted; but, obviously, that could only have been granted as a favour or an act of grace, which parties under such equivocal circumstances rarely or ever can expect to receive from revenue officers.

The appellant’s notice, on the receipt of Mr. Noonan’s note, was timely, and his course of procedure for the assertion and trial of his claim or a return of his goods might have been followed up under and by virtue of the terms of the Customs’ Act.

The action of the Board of Revenue and its assumption of judicial powers, and the subsequent sale of the goods, though manifestly irregular, do not purge the forfeiture or invalidate it or the seizure of the goods. Nor are such irregularities effectual in revesting the importer with the right of property and attendant right of possession in the goods, indispensable to him in the maintenance of this action.

In my judgment, under the terms of the Customs' Act and the law applicable to the facts, we cannot sustain this appeal. I consider, however, it presents circumstances which enable us to relieve the appellant from the payment of the costs incurred in these proceedings.

Sir J. S. Winter, Q. C., for appellant.

Hon. E. P. Morris for defendant.

MITCHELL v. BARTLETT.

1892, November. BY THE COURT.

Fisheries' Commission, powers of—Construction of rules—Setting cod-traps, Labrador—Right of action for damages by reason of infringement of regulations.

A party set his cod-trap on the coast of Labrador, so near to another's trap as to lessen the catch of the latter. It appeared that in 1888 a law had been passed abolishing cod-traps, but in 1889 a Fisheries' Commission was established with powers to make rules for regulating the prosecution of the fisheries. One of the rules permitted the use of cod-traps, but did not define the distance they were to be set from each other, as was provided in the law repealed. In an action for damages,

Held,—That as the rules of the Fisheries' Commission only prescribed the use of cod-traps, there is nothing to prevent the setting of a cod-trap near to another so long as it does not amount to a breach of the common law.

THIS case was tried before Mr. Justice Pinsent, on Northern Circuit, during the present term at Brigus. The plaintiff sought to recover damages from the defendant for having at Domino, Labrador, set his codtrap at a distance of less than 80 fathoms from the plaintiff's cod-trap, viz.: at a distance of about twenty-five fathoms only, whereby he claims to have lost 150 qtls. of fish which he would otherwise have caught; and for which loss damages to the amount of \$300 are sought to be recovered.

There was evidence on both sides with regard to the probable damages, the general result of which is, in my opinion, that the plaintiff has proved substantial injury arising from the defendant's proceedings; and, subject to there being any right of action in the case, I assess the amount at \$100.

It is a question whether, even if the law is in force prescribing the distance at which cod-traps must be set from one another, the violation of the rule affords any ground of civil action, but has the effect only of subjecting the offender to the statutory penalties.

But subject to the first objection, we are confronted with the question of the authority of the Fisheries' Commission and the validity of its regulations.

That Commission was established by law in 1889, and is empowered to make and prescribe rules and regulations in relation to the prosecution of the several fisheries, &c.

By regulations made under this authority, the use of cod-traps is allowed, but then it is said there was an existing statute (1888) abolishing the use of cod-traps, and the question arises whether the Commission's powers extend to the repeal of a statute. If not, no man possesses a right to set cod-traps, and consequently no one could maintain such an action as the present. But again, supposing the Fisheries' Commission to possess the power of permitting the use of cod-traps in the face of an existing statute, it is said there having been no limit of distance prescribed by the Commission, that the former statute law regarding the distance becomes revived, and incorporated with their rules *ipso facto*; but if there is no law regulating distance, then the plaintiff contends that, if it is lawful to set cod-traps, they must at least be set so as not to interfere with others having a prior place; and that, if they do any injury accruing, gives occasion for an action at common law.

Now here arises a complication of a very important character, touching the power of the Fisheries' Commission, and the public rights of fishing, and the private rights of action, and as it would be undesirable in the public interests that a judgment should in such a case be given by one judge sitting alone, where there is no difficulty in obtaining the judgment of the full Bench and thus avoiding possible future conflict of decision. I reserve all these and any other questions of law that may arise in the case, for argument in the general term at St. John's.

Case from Northern Circuit heard on argument before full Court.

We are of opinion that the powers conferred by statute upon the Fisheries' Commission are (subject to the exception as to treaty rights) sufficient to enable it, with the concurrence of the Legislative Council and House of Assembly, to prescribe rules in respect to the methods, places, times and seasons of prosecuting the fisheries, notwithstanding the rules may deal with and have the effect of repealing a prior, and otherwise unrepealed statute on the same subject, or the same points.

We therefore decide that in permitting the use of cod-traps within certain limits, the Commission acted within its powers; but that as no distance between which cod-traps are to be set is prescribed by the rules, parties setting them are not restricted as to distance beyond the common law obligation not to interfere with each other. With the statute abolishing the use of cod-traps, the prior provision as to distance fell through; and if it is the object of the Commission to revive the old rule or to make some new one, it ought to be so expressed. It may be useful to note here, that on the trial of this action, there appeared to be a consensus of opinion on the part of experienced witnesses, that sixty to sixty-five fathoms between cod-traps, is the preferable distance for the Labrador coast. There is no sufficient evidence in this action to sustain a common law breach of the plaintiff's rights, and the action must be dismissed but without costs.

Mr. Scott, Q. C., for plaintiff.

Mr. Clift for defendant.

1892, November. HON. MR. JUSTICE PINSENT, D.C.L.

Gift—Delivery—Monies—Gift of monies by word of mouth without delivery.

Monies (packets of sovereigns) were found in a box of the testator outside the property he had bequeathed under his will to certain of his children. These monies were claimed by the wife of one of testator's sons as hers, and as trustee for certain of her children, and that it was a gift *inter vivos*. One of the next of kin disputed this position, and claimed the money should be regarded as belonging to the general estate of the testator. The evidence in support of the son's wife and her children for the position set up, was that the testator had said, pointing to the packets of money, before he died, "It is all for you and the children." There were other facts adduced pointing to the same intention.

Held—That there was not the clear and unequivocal terms of present donation, accompanied by a change of ownership, which is essential to constitute a binding and concluded gift *inter vivos*. The evidence only supported an unfulfilled intention of testator, which could not be allowed to take the place of a formal will or effectuate the gift.

THE deceased, Mr. Fitzgerald, late stipendiary magistrate at Fogo, in the northern district, made his last will and testament on the 8th of January, 1891, and died two days after so doing.

He was worth in money and property several thousand pounds, which, saving some special bequests which it is unnecessary to particularize, he bequeathed to his sons—William, Michael and Ambrose, and to the children of his son William.

Mr. J. T. Croucher and testator's son, William, were executors of the will.

The legatees being unable amicably to settle their differences and the question of the disposition of certain monies not specifically bequeathed by the will also arising, the parties came before the court during its late circuit term at Fogo, and, in two actions, sought for judicial administration and distribution of the estate.

Of the points raised in these actions I disposed on circuit of all but the question of certain of the monies lastly above mentioned.

I decreed, for instance, a partition of the waterside premises at Fogo between the legatees Michael and Ambrose; and that partition was immediately effected by commissioners on the spot; and I decreed a sale instead of partition of the Shoal Harbor property. Again, there were two houses, in one of which testator lived up to the time of his death with his son Ambrose, and another next door to it occupied by Michael,

both owned by testator. These were left severally to Ambrose and Michael, but the question of what land went with each house was a subject of contention; and I, holding that the curtilage of each house went with it, determined, after hearing much evidence, and after more than one careful view of the premises myself, where and what the dividing lines were, and decreed accordingly.

With regard to a very valuable sewing machine, I arrived at the conclusion that it formed the subject of a gift perfected by delivery to the child Bridget Gertrude, daughter of William, and gave judgment accordingly.

With regard to an alleged indebtedness from Michael to his deceased father, the testator, I held that it had been 'squared off' and no longer existed as a claim of the estate upon Michael.

All these and some minor disputes being thus disposed of, and the parties having received their several pecuniary legacies under the will, there remained undisposed of certain monies which were found in a box in the house, principally in gold coin, amounting to over \$2,300.

Of this amount there were three small packets or cartridges of sovereigns, two containing fifty sovereigns each, marked respectively "W. B. Fitzgerald" and "A. T. Fitzgerald," and a third containing ten sovereigns marked "M. E. Fitzgerald"; and there then still remained a balance of \$1,882 in gold — Those three packets of money, besides being addressed as above, bore the direction: "Not on any account to be opened until I am dead and buried." There was also a sum of \$250 in a separate cash box, but this was divided as a residuary amount. The money in the packets was appropriated to the persons to whom they were addressed, and this remains undisputed.

The executors have not included the \$1,882 as part of the estate of the testator and as subject to distribution; but it was and is claimed as belonging exclusively to the children of Wm. B. and Catherine Fitzgerald. That amount is said to have been a gift from the testator to their mother in trust for them. The sum was not marked in anybody's name, but was in several plain cartridges endorsed with the amounts contained with them.

It is said that the testator, wishing that this sum should not be imperilled in William's business, made it a provision for his wife and children by means of a gift either *inter vivos* or as a *donatio mortis causa*.

A great deal of evidence was taken upon this claim during the circuit, and upon motion an order was made for the taking of some additional evidence afterwards.

I have now to inquire in what way the position taken on behalf of the four children of William and Catherine Fitzgerald is sustained, and whether there is sufficient evidence in law to effect the purpose which it is said the testator had in view for them, irrespective of the bequests of his will.

These children are legatees under the will for a specific sum of twelve hundred dollars, and of one-fourth of the residue of the estate amounting to about \$665.

In addition to these sums their mother is claimant on their behalf for the amount now remaining in dispute, \$1,882.

The executors favour this position on behalf of the children of William, and William for himself personally concedes to them any claim or interest he might have in that sum as residue of the estate, and consents that the whole may be decreed to be held in trust by their mother for them. Michael Fitzgerald admits the claim of these children and consents to the same course; Ambrose insists that there is no sufficient evidence of any intention on the part of the testator to give this preference, and that if there were any such intention it should have been expressed regularly in a valid will in the same manner as with regard to the rest of testator's property; and it is contended on his behalf that to give effect to any such verbal and supposed disposition as is set up here on behalf of the children of William, would be to destroy the efficacy of the Wills' Act and defeat the objects sought to be secured by the provisions of that statute. William swears that this amount was held in trust by his father for his grandchildren (William and Catherine's children), but of this we have literally no evidence beyond the opinion of William regarding the effect of certain facts which fail to sustain such a case. I may therefore at once disregard this position, and proceed to consider whether there was any form of effectual gift of this sum by the testator to the children, or to their mother in trust for them.

William Fitzgerald states that on the Saturday after his father's death, his wife took this money away in a bag as money held in trust by her for her children; that Father Walker handed her the money; that the testator's three sons were present at and consenting to this delivery. William swears that he first learned from his wife of the existence of this money, which was found in the boxes under the bed. He

further states that by direction of the testator, and just after the making of his will, he took the keys of the boxes from under testator's pillow, and unlocked them; that deceased pointed to the marked cartridges of money, and said "those are all right;" that he then asked testator what was to be done with the rest, to which he replied, "You are not to know, you are an executor, lock the box." The keys were then taken by testator and put by himself on a black ribbon round his neck, where they remained until just before he expired.

Just before he died, Father Walker inquired of testator what was to be done with these keys, and he answered that they were for his son William. William, I would here observe, is one of the executors.

Immediately after testator's burial, the monies were produced; and with regard to this sum of \$1,882, he (William) says that his wife explained in presence of the three sons and of Father Walker what deceased wished to have done with this money, and that in conversation with and in answer to a question from her as to what was to be done with this money, he putting up his hands had said, "it is all for you and the children."

It is claimed that Ambrose recognized the application of this money in that way; that he made no objection to Catherine appropriating it for her children; and that when it was proposed then and there to pay him out of this amount a small sum due to him by his father's estate on post office account, he exclaimed, "I want to have nothing to do with that money," and it is further contended that Ambrose accepted his share of the residue, and gave a receipt in full, irrespective of this money. This receipt was given in the month of March upon the division of monies in the house, other than the sum of \$1,882 already taken away by Catherine. All this Ambrose explains by stating that he was led to believe at the time, that the \$1,882 had been disposed of according to clear and positive acts and instructions of the deceased, known and communicated by him to Catherine Fitzgerald and Father Walker, and even reduced to writing, but of which it afterwards appeared there was no proof.

Michael Fitzgerald swears that the day before his father's death, he said to him "William is secured all right, but it has to be a dead letter, never to be spoken of outside the family." And this, it is contended, was intended to apply to the supposed gift of the \$1,882 to William's children.

Now the next and most important evidence in this case, is that of Catherine Fitzgerald. She states that less than a week

prior to testator's death he called her to his bedside and told her he had a secret to communicate to her concerning gold he had in the house; that he had gold in handfuls in a box below his bed enclosed in a larger one; that there were presents in envelopes for his family addressed to themselves. She adds, he gave me to understand that all the gold was not in the envelopes, but \$1,000 or more additional; that he intended to arrange it privately and wanted no one to know it. Mrs. Fitzgerald states that she then said to testator "don't tell me," and Father Walker's name was suggested as the person to arrange it. After that, William, having at his father's request, read the will, informed her of it, and he, seeming to be disappointed at its terms, she told William not to be dejected as she knew his father had other monies, large sums in gold in the house, to which William remarked that his father must be raving.

After that, the witness (Catherine), thinking it desirable to refer to the question of these monies again, in case testator should fail to see the priest in time, asked him to finish telling her about this money; and he, putting up his hands, exclaimed, "It is all for you and the children;" and he remarked that he would arrange it when the priest came. When the priest did come, William remarked to him, "I am afraid you have come too late for my good." Then Mrs. Fitzgerald informed Father Walker of what testator had said to her. The priest saw the testator alone at first, and immediately after, in presence of the family; and then, in reply to an inquiry from the priest, as to what was to be done with the keys on his neck, he replied, they are for my son William. Then Father Walker untied them from testator's neck and gave them to William.

Father Walker, being examined, deposed that on the day of death the testator, speaking to him of his temporal affairs, after spiritual administrations had been attended to, said "I have money, gold to leave to parties," not naming any person. This witness says he understood testator to say that the names of the parties would be amongst his papers, and upon being pressed more closely as to the names he said "Kate," (i. e., Mrs. William Fitzgerald) knows; and he added "let me alone until bye-and-bye, I am going to sleep now, we will settle things bye-and-bye." He died in a few minutes, without making any further communication. Father Walker confirms Mrs. Fitzgerald's statement as to the keys on deceased's neck. Then he swears that when the money came to be dealt with after the funeral, Mrs. William Fitzgerald seemed to know all about it,

and stated that the testator had informed her it was all for her and the children.

Father Walker further states that Ambrose was present, and appeared to be satisfied, and he, (Father Walker), believed that any disputes were at an end and all parties satisfied.

He then speaks of the subsequent division of the other monies in March, and of the signature by Ambrose of the receipt of \$76, "in full for all claim for cash in the house at the time of his (testator's) death, and given according to his instructions."

If I were fully satisfied that this acceptance and receipt took place in the absence of any misapprehension and mistake, and acquiescently with full knowledge of the facts and in the belief and desire that the testator's real intentions were being carried out, I would hold that, however deficient the facts might be, to transfer a title to those claims to be the donees, yet that Ambrose himself had made a binding and complete gift as from himself.

I am sensible, however, of the danger as a precedent of so dealing with this litigants' rights, particularly as the monies are to be regarded, until this contest be disposed of, as being under the control of the executor, William. I feel constrained to give him the benefit of his strict legal rights.

If the dealing by the testator with this disputed sum of \$1,882 could be regarded as a gift of any kind, it would be as one *inter vivos*, i.e., as a gift made by one living person to another living person to take immediate and irrevocable effect.

The facts in no way fulfil the conditions of a *donatio mortis causa*, to which are essential such a delivery as will give the intended donee possession and control of the chattel, subject to the defeasance of return to the donor in case of his recovery from supposed impending death.

Then, as an ordinary binding and concluded gift, *inter vivos*, it is essential that there should be clear and unequivocal terms of present donation, accompanied by a change of ownership, established by the conduct of the parties. (See *Cochrane vs. Moore*, 38 W. R., 588, for a clear exposition of these principles and review of preceding cases.)

In this case the evidence points to an unfulfilled intention on the part of the deceased to make some special disposition of the money in dispute or of part of it, which intention was to be expressed in terms to Father Walker, and had been foreshadowed to Catherine Fitzgerald, and which probably would

have taken definite form had the testator retained strength of mind and body to give form and effect to it. He did not live to convey his wishes to Father Walker, and they were too imperfectly suggested both as to the matter and terms of the gift to Catherine to be intelligible; but even if this were otherwise, and nothing more than appears in this case had taken place by way of actual transfer, I should be asked, in effect, to allow a will to be established by word of mouth, when the statute law so wisely, for the protection of property and to prevent imposition and mistake, requires certain formalities, evidenced by writing, signature and attestation to be observed. I must hold that Ambrose Fitzgerald is entitled to receive a fourth share of this sum of \$1,882, subject to costs; but that with regard to the remaining three-fourths, the same do according to the acquiescence and agreement of all the other parties, vest in Mrs. William (Catherine) Fitzgerald in trust for her present children in the manner in which the bequest of a share of the residue is made to them, and that, under the circumstances, the costs of the litigation arising out of this particular contest be paid out of the said fund of \$1,882.

Mr. Emerson, Q. C., for plaintiff (Ambrose).

Mr. Hayward, Q. C., for executors.

Mr. Scott, Q. C., for William and Catherine Fitzgerald and for Michael Fitzgerald.

1892, *December*. LITTLE, J.; CARTER, C. J.; PINSENT, J.

*Practice—Solicitor—Articled clerk—Abandonment of service—Service de novo—
Reckoning detached periods—Mandamus to benchers to inquire into
fitness of articled clerk.*

In July, 1886, M. was articled to one Davis, a solicitor, and duly served him until November, 1887, when his articles were assigned to Sir Wm. Whiteway, Q. C., whom he served until October, 1888, when the service was terminated. In Sept., 1890, he became again articled to Sir J. S. Winter, Q. C., and served up to May, 1892. An application was then made by him to the Benchers of the Newfoundland Law Society to enquire into his fitness to act as solicitor. He was refused admission on the grounds that the break in the service from 1888 to 1890 constituted an abandonment of the service necessitating a service *de novo*. M. obtained a rule *nisi* on the Benchers, calling on them to shew cause why a *mandamus* should not issue commanding them to enquire into his qualifications. On the argument it was contended for the Benchers that, having exercised their judgment, no power lay in the court to grant the writ; that the writ can only issue to compel the performance of a duty which has not been done, and not for the undoing of an act which has been done.

Held—That the writ of *mandamus* would lie, and that the Benchers be directed to proceed with the application; that the service being shewn to be fully completed, though not continuously, the intention of the Act was complied with. The court will grant the writ when there is an absence of finality in the hearing of the application, and when it appears the Benchers have confined their attention to a part of the application only.

IN this matter the applicant obtained a *rule nisi* calling on the Benchers of the Law Society to shew cause against the issuing of a *mandamus* commanding them to enquire into his qualification, fitness and capacity to act as a solicitor of this court, and to grant him a certificate of such competency, and of his having complied with the requirements of the Act 52 Vic., cap. 22, entitled "The Law Society Act of 1889."

The grounds on which the applicant rested his claim for the rule are explicitly set out in his own affidavit. From this statement it would appear that, on the 1st of July, 1886, he entered into articles of agreement with Mr. Davis, then a practicing barrister of this court, to serve him as his clerk in the practice and profession of a solicitor, and did so serve him until and up to the 1st of November, 1887, when a formal assignment of these articles to Sir W. V. Whiteway was duly executed by the parties, and the applicant served Sir W. V. Whiteway thereunder as his clerk up to the 1st day of October, 1888, when the service was terminated by mutual consent.

It then appears that other articles of agreement were executed, under which the applicant entered into the office of Sir

J. S. Winter, Q. C., binding himself to serve him for the remainder of his term of service as such law clerk, and that he was still engaged as such when he made his application to the Benchers of the Law Society on the 6th day of May, 1892, for his examination preparatory to his admission as a solicitor.

During the currency of the agreement, and, as is alleged, with the full assent and approval of Sir J. S. Winter, the applicant attended during two terms at Dalhousie College, Halifax, Nova Scotia, and there passed his terminal examinations and was duly granted and had conferred on him the degree of Bachelor of Laws.

It would further appear that the requirements of the terms of the Act were complied with in relation to the filing of articles of agreement prior to applying for his admission, and the affidavits of service and notices thereunder were duly made and given, &c., but that no notice of intention to attend at the University had been given the benchers, nor had their approval thereof been obtained prior to such attendance. Exceptions, however, to these latter omissions were not taken or urged by the benchers on the argument of this rule.

From the sworn statement before us, the applicant, it would appear, after having thus, as he avers, formally supplied the benchers with the documentary evidence in support of his right to have conferred on him the benefits and privileges statutorily provided for in such cases and under such circumstances, was refused that examination and denied by the benchers to be entitled to admission as such attorney or solicitor on the following grounds: first, that the break in the service to Sir W. V. Whiteway, from October the 1st, 1888, to September the 19th, 1890, constituted such an abandonment of service as would require a service *de novo*; second, that were it not for such abandonment, the service of two years and three months under Mr. Davis and Sir W. V. Whiteway would be regarded as sufficiently effective.

This being the position of the applicant and the result of his petition to the Law Society, he now resorts to this court and invokes its intervention by its writ of mandamus to the end and for the object and purposes given in the recited rule.

On the argument it was contended that the benchers, having exercised their judgment and arrived at and pronounced a determinate opinion on the matter, the conditions are not such as are called for to entitle a party to the grant of the writ or to an order absolute on this application.

The grounds, or rather the premises, from which the conclusions of counsel appear to have been drawn, are embraced in the doctrine laid down in text books on the subject of mandamus "that the application must be to compel the performance of some duty which has not been done, and must not be to order the undoing of an act which has been done." This proposition presupposes a full adjudication and final determination on the merits of the application at the hands of the benchers on behalf of the Society. But, if from circumstances, the court should conclude that there has not been such a hearing or adjudication, and that there remains a wrong still remediable, and which cannot be remedied in any other way or mode, it has acceded to such applications in order that the matters in question may, ultimately, if necessary, be fully brought before it through the proceedings to be adopted under the writ. The jurisdiction thus exercisable is altogether in the discretion of the court. That discretion, it is needless to state, must be guided by the principles and rules authoritatively recognized as generally governing in the granting or refusing of the writ. We have, therefore, to look to authority, and, so far as may be in accordance with right and justice, to apply its rulings to the circumstances presented in each case as it arises.

In the present instance it is desired this writ might issue addressed to the benchers of the society, requiring the performance on their part of a duty devolving and imposed on them by a statute under which the society has existence and unity as a body corporate and politic.

The rights and powers imposed on it in relation to the examination and admission of law students and parties applying to be admitted solicitors of this court, are very properly almost of a plenary character.

The privileges with which, in this particular, the Society is by law now invested are conferred obviously for the purpose of securing, in the interest of the bar and the public, the greatest competency and efficiency, intellectually and otherwise, in aspirants to membership of the legal profession; and, so far as the agency of the Benchers can accomplish such a desirable end, to preserve and protect that professional status which should characterize a body so selected and constituted.

It has full powers conferred on it for the adoption of rules, subject to the approval of the judges, as visitors, for the management and attainment of the objects and purposes of its incorporation.

With these and other privileges and powers, it has, by express enactment, imposed upon it or its Benchers the authority, duties and rights formerly vested in the judges of the Supreme Court in passing on the qualifications and claims of applicants for admission as attorneys or solicitors.

In view, then, of its corporate character, we find it to be a public body, having imposed on it statutable obligations towards members of the community who may have, in conformity with the prescribed terms, &c., of the law and the rules of the Society, qualified themselves to participate in the privileges it is empowered and directed to confer.

Under such conditions, the applicant, alleging that he has conformed to and fulfilled the requirements of the law, and after having further qualified himself by receiving the degree of a University during the time of his service, petitions the Benchers for examination and admission accordingly. This position is met by the Benchers in the manner and terms stated, whereupon it is contended it would be contrary to recognized principle and precedent for this court to grant the writ of mandamus requiring the Benchers to proceed further in this matter passed on by them.

By way, then, of throwing some additional light on the position thus assumed by the parties respectively, reference may properly be made to the observations of Bayly Justice, in his judgment in the case of *R. vs. the Benchers of Lincoln's Inn*. There it appeared that one Walford had applied to the Steward's office of the Society of Lincoln's Inn to have his name enrolled as a member of that society, and towards that end acted in conformity with the requirements of the society. His application was refused. Thereupon he appealed to the twelve judges, as visitors of the Inns of Court, praying redress. He was informed that the judges had no power to interfere in the matter. He subsequently, on affidavit, obtained a *rule nisi* for a mandamus; and, after hearing the parties, it was stated in the judgment that the court could not compel the Benchers to admit the applicant, as a mandamus applies only where the party has a right to have a particular thing done and where there is an obligation on the parties to do it. Considering the nature and institution of the society there did not appear to be any duty incumbent upon them to admit all who applied for membership. That there was a great difference between such a case and one in which a party has been suffered to incur expense and expended his time as a student at law for a length of time and then applies to be called.

If it could be shown that the party had an inchoate right to be admitted a member of these associations, and that there was an obligation on them to admit him, and that the party aggrieved had no other remedy, then it would follow that this court would be justified in granting a mandamus.

From this reference it is clear that although the association had entertained the application and passed on it, still it was competent for the party to apply for the writ, and that the previous determination of his rights by the society was not regarded even of such moment as to form any grounds of objection to the granting of the writ. Furthermore, it must be remembered that the Inns of Court were voluntary societies and not corporations, and had no constitution by charter from the crown. And all the power they had concerning the admission to the bar was delegated to them from the judges, and in every instance their conduct was subject to their control as visitors. Under our statute the powers or rights of the judges, as visitors, are undefined. I fail to see, as intimated by some learned counsel, that the judges can exercise over the society any visitatorial powers of the crown as to enable or warrant them in any way interfering with the conduct of the Benchers under such circumstances as are here set out.

The Benchers, moreover, have confined their attention to a particular part only of the claim of the applicant; there is, consequently, an absence of that finality in the hearing of the claim which should exist even if the contention of counsel were maintainable. It will be found in the authorities treating of the doctrine of mandamus (*Short &c*, p. 723), that in cases, such, for instance, as the one quoted above, or where there is an alleged refusal by a body corporate to proceed to a compliance with its duties or obligations by further action or investigation in relation to matter within its powers, the court may grant the writ.

The court requires, necessarily, its adjudication into the proceedings inducing the application in order to ascertain if there has been, on the part of the party complained against, a failure of justice or a non-compliance with statutable provisions relating to the discharge of a duty imposed on it.—*Ch. R. vs. Stafford*, 3 T. R.; *R. vs. Grs. of Sunford*, 1 N. & P., 338, &c.

This contention, therefore, of the matter being effectually heard and pronounced upon by the Benchers does not appear to me to be sufficiently supported, nor to have the effect of concluding the applicant from an appeal to our jurisdiction in the granting of this rule.

The next and apparently, from the attention given to it by counsel at the argument, the most formidable difficulty meeting the Benchers on entering upon the inquiry was the gap occurring, or time lost, between the termination of service under the articles entered into with Sir W. V. Whiteway and the new service under the articles with Sir J. S. Winter. The Benchers, as appears by the communication from the secretary of the society, regarded the conduct of the petitioner under the circumstances, and the time thus allowed to elapse, as an abandonment of the service of clerkship, thereby creating a break reparable in no other manner than by a service *de novo*. Beyond this inquiry and determination the Benchers do not appear to have proceeded, that being considered as a finality to the then application.

Now, as the question of completeness or incompleteness of service has been forced so vigorously to the front by counsel, it may be as well at present to ascertain what construction under the circumstances may be applied to the term "so to be served," and to the manner in which it may be fulfilled.

In the first place we find that the 52nd section of the statute provides that: "The following persons and no others may be admitted and enrolled as solicitors:—Any person who has been bound by contract in writing to a practising solicitor, &c., to serve, and has served him as his clerk for five years; provided, that the time, &c., may be reduced . . . one year . . . where the clerk has, prior or subsequent to entering, attended two terms at a *recognized* law school with the approval and consent of the society, &c., and passed the terminal examinations; . . . *for the purposes of this section* the time so spent shall be computed as if it had been passed in the actual service under his articles; and any person who has had conferred upon him the degree of Bachelor, Master, &c., in any of the universities or colleges mentioned, &c., and has been bound, &c., to serve, &c., and has served as clerk for three years."

These, then, appear to be the legal limits and conditions of service primarily requisite to be complied with in the case of an applicant for admission and enrollment as solicitor.

In the present case, from the statement of facts on which the rule was granted, it is shewn that the applicant has, under three separate articles of agreement entered into by him with practising solicitors, served as clerk for a period of three years, eleven months and seventeen days; that is to say, for one year and four months with Mr. Davis, eleven months with Sir W. V.

Whiteway, and one year and eight months and some seventeen days, or more, with Sir J. S. Winter.

The Benchers in their inquiry have not gone beyond the termination of service with Sir W. V. Whiteway, considering, as was stated in the argument, that the break which followed between that period and the date of the articles with Sir J. S. Winter should be held to be in law and in fact an abandonment of the time so served.

It was correctly stated by counsel that the language and terms of our Act in this particular are in conformity with the English statute, "The Solicitor and Attorneys Act," regulating the admission of solicitors or attorneys in England.

As this is the first occasion in which the practical application of the terms of our Act on this subject has been submitted to judicial inquiry, and the consequent absence of any local precedent or ruling for our guidance in the matter, we may very properly have reference, under the circumstances, to the dicta and adjudications of the judges in England in cases somewhat analogous and which have arisen under the operation of the English statute.

It may be observed before citing these cases having relation to the construction to be applied to these statutes, it is stated by Coleridge, C. J., in delivering a judgment on such an application, "That one would be desirous, under the circumstances, to give the Act as liberal a construction as possible . . . without frittering away its provisions."

In the case of *ex parte Williamson*, 4 Ch. D., p. 581, the applicant was articulated as clerk in 1861 to one Roberts, for five years; had served him for one year, eleven months and eight days, and then, in November 1863, with Roberts' consent, the articles were cancelled, and Williamson entered a merchant's office, where he remained for eight months. He then left and was out of employment for a short time, when he returned to Roberts, and was re-articled to him to complete the remaining period of service, and continued therein until he had completed in all a service of three years, eleven months. Being then out of health he was obliged to leave Roberts' service, and, after a lapse of considerable time, when he remained unemployed, he was assigned and re-articled to one Louis. Now these breaks on the term of service were not regarded in the light of abandonment, but, from the evidence, it was considered by Jessel, M. R., that the articles were cancelled by "mutual consent" within the Act 6 and 7 Vic., c. 73, and he therefore granted the application.

In *ex parte Trenchard*, reported in 9 L. R., p. 406, the party was articled to his father, an attorney, and served him for two years, when, becoming out of health, his father obtained him a commission in the army in 1859. In 1871 he left the army and re-entered his father's service under fresh articles of clerkship, and duly served for three years. An application was then made, under the 13th section of the Act, that the two years under the original articles might be allowed to be reckoned as part of the five years. Cockburn, C. J., thought the first articles were cancelled by mutual consent, . . . that the statute ought to have a liberal construction, &c., and made the rule absolute for admission of the applicant.

And in *ex parte Cross*, 1 J., 1843—In this case an articled clerk, after a period of two years' service, for the restoration of his health had to go abroad. During his absence he entered at Harvard University, Mass.; for six or seven months attended law lectures therein, and received certificates for diligence and good conduct, returned to England and re-entered the master's service to complete his term of service. On his application for admission as a solicitor, the examiners considered his service insufficient. Thereupon the motion for his examination was granted, the absence being regarded involuntarily occasioned by the state of his health.

The cases *ex parte Matthews*, 1 B. & Ad., and *ex parte Hodge*, 2 Jm., 999, were cited in connection with the judgment in the foregoing case.

These, and many other analogous decisions in reported cases, are found to indicate sufficiently the trend of judicial opinion as to the construction applicable to the terms of the statute then and at present governing in such cases. From the reported rulings it may then be conceded that time of service having been shown to be fully completed, but not necessarily from a continuous and unbroken period of time, then the intention of the Act and the terms of the articles of agreement are complied with. Where the break arises in some unavoidable manner, and the cause thereof is properly accounted for, it should not be in keeping with the spirit of the Act nor with the intention of the legislature that such an interruption in the term should have the effect of operating as an abandonment of the original undertaking to prosecute such studies and as a deprivation and forfeiture of the time actually given in completion of the prescribed statutable term.

The fact that the term is made up of fractional periods of service under different articles, and that these separate periods in their entirety go to make up the full term of actual service called for should not of itself prejudice the party's claim to admission.

From observations and admissions of counsel at the hearing of the argument, it would appear that the applicant will receive at the hands of the Benchers full credit in his term of service for the University degree conferred upon him, although certain conditional requirements called for by the statute, in respect of notices of approval by the Benchers, were not complied with.

In view, then, of the limited inquiry made by the Benchers into the particulars of the claim for admission, further comment is at present uncalled for.

In my judgment the procedure by writ of mandamus is, in this instance, applicable and ought to be granted, and the matter remitted to the Benchers of the society, who should be directed to proceed with the hearing of the application and to inquire fully into the claim of the applicant for admission as a solicitor of this court.

HON. MR. JUSTICE PINSENT:

I am of opinion (1) That the writ of mandamus will lie in case of necessity to enforce the statutory duty of examination.

(2) That, taken in conjunction with the degree of an approved University and the certificates of service, the evidence before us sustains a more than sufficient period of service and study to entitle the applicant to examination for admission.

The Chief Justice concurs in remitting the matter, &c., for a full inquiry into the claim for admission.

Sir J. S. Winter, Q. C., for Mr. Morine.

Mr. Kent, Q. C., and *Mr. Horwood* for the Benchers.

1894, *March*. HON. SIR F. B. T. CARTER, C. J.

Practice—Costs—Rule for stay of proceedings and reference—Rule silent as to costs—Costs in discretion of arbitrators—Power of court to order as to costs after publication of award.

Where in an action against an Insurance company the company pleaded in bar the condition in policy, that should a difference arise, the parties should submit the same to arbitration. Judgment was given against the company; the company obtained a stay of proceedings and reference, but the rule was silent as to the costs of the arbitration and award; an award was made in favor of plaintiff with costs; a summons was obtained for the taxing of the costs, to which cause was shown contra, and it was contended it was *ultra vires* in the court to give directions as to costs when the reference was under the condition of the policy, and that the application was too late as it was after the publication of the award.

Held—The court had authority to make an order as to costs of an arbitration and award as if it was a compulsory reference. The costs of the reference and award should be in the discretion of the arbitrators.

THIS was an action to recover on a fire policy with a condition that if any differences should arise they were to be submitted to arbitration. The defendant company pleaded in bar this condition to the continuance of the action, but as the terms of the condition did not come within the ruling in *Scott vs. Avery*, 5 H. L. Cas. 811; *McDougall vs the Mutual Marine Insurance Company* in this court, and the like cases, judgment was given for the plaintiff with costs. Defendant's counsel then moved, under the 43rd section of the Judicature Act, 1889, for a stay of proceedings and reference, when a rule was granted with assent, which was subsequently taken out on behalf of the defendant, but was silent as to the costs of the arbitration and award. The parties having agreed upon arbitrators, plaintiff's solicitor submitted the draft of a rule to defendant's solicitor, which, *inter alia*, provided for the above costs being in the discretion of the arbitrators, which the latter solicitor refused to sign, contending that the terms of the submission were contained in the condition. The arbitration proceeded, which resulted in an award in favor of the plaintiff with costs.

Plaintiff's solicitor obtained a summons for the taxing of these costs, to which cause was shown contra, on behalf of the defendant, whose counsel contended it was *ultra vires* in the court or a judge at any time to give directions as to costs of arbitration, where the reference was ordered in accordance with a prior agreement respecting further disputes between the

parties, such as the condition referred to in this action, as that could only be done when the reference was compulsory, e. g., under the 36th section of the Judicature Act, and that at any rate the application was too late after the award had been published. Plaintiff's counsel produced an affidavit of the plaintiff, stating that it was agreed upon before the arbitration proceeded between him and the solicitor for the defendant that the costs of the reference should be within the discretion of the arbitrators; this the defendant's solicitor positively denied in a counter affidavit. On reference to the Judicature Act, which in respect to this proceeding is a transcript of the Common Law Procedure Act, Consolidated Statutes, 1872, I am clearly of opinion the court or a judge had authority in this case in common with cases coming under the 36th and 39th sections to make order as to the costs of the arbitration and award; the same language as regards those is repeated in each section, while an enlarged authority is given by the 43rd section in the discharging or varying of any order as justice may require. The condition in this policy does not contain all that is requisite for its fulfilment, as, for instance, the appointment of arbitrators, which the court or a judge can supply (if the parties do not agree upon them), and it is apparent the rule or order may in some instances be compulsory. The direct conflict in the affidavits prevents me from taking them into consideration, and the only remark I feel inclined to make with reference to them is, that the course taken illustrates the impropriety of a party to an action interfering with questions of practice when there are solicitors on both sides. If motion had been made at the time of granting the rule or afterwards before the award the court might have directed those costs to be within the discretion of the arbitrators, as without such direction they had no authority in the matter, but as they were permitted to proceed in their inquiry under the rule taken out by the defendant's solicitor, as aforesaid, and a final determination and award arrived at and published, I am of opinion that it is too late now to ask the court to amend the rule for the stay of proceedings and reference, especially in so material a point as the costs which are not necessarily involved in the reference as between the parties, without special direction.

Before the English Arbitration Act, 1889, which has not application to this country, *Russell on Awards*, p. 92, states "the more recent form of order is that the costs of the cause shall abide the event, and that the costs of the reference and award

shall be in the discretion of the arbitrators." And it is advisable that an approved precedent should be followed.

Mr. Johnson for plaintiff.

Sir J. S. Winter, Q. C., for defendant.

MOSEDALE, ET AL. vs. McDOUGALL, ET AL.

1893, *March*. CARTER, C. J.; LITTLE, J.

Will—Construction—Gift of freehold and monies to devisees free from control of husband—Survivorship of husband right to wife's share.

A testator devised to five daughters, amongst other bequests, the residue of his estate, monies in banks, rents and proceeds of sales of properties equally amongst them or their issue free from control of husbands, and in the event of death of either without issue, her share was to be apportioned equally amongst survivors. The land was not sold but apportioned amongst certain of the devisees under power of an agreement between the devisees and executors. One of the devisees to whom land had been assigned, died without issue. The survivors claimed from her husband the share of the moneys which had been allotted his wife, and also the land conveyed to her, contending that the arrangement as to the division of land and release given to executors was not intended to interfere with the terms of the will as to survivorship on the death of either without issue.

Held—That the period of division was on death of the testator, and that the survivors at that time took the whole of their respective legacies. The deed of arrangement was a final and absolute distribution *inter se*, and the parties are estopped, not having made any reservation as to survivorship in their release to the executors from setting up their claim on that ground. The claim to the corpus of the bequest is altogether inconsistent with the nature of their claim, attaching, as it did, only to unexpended or undisposed of monies or property.

THE plaintiffs are four daughters and legatees under the will of their late father, Henry LeDrew, who, after making certain bequests to the plaintiffs and a deceased daughter, Ellen Skeans, and giving an annuity with the full and unrestricted use of a dwelling house in which the testator then resided (1st November, 1878) the furniture and other property therein—save two articles mentioned—to his wife, Mary Ann, during her life time, directed that after her decease the furniture was to be divided equally among his said four daughters, and if they could not agree between themselves, it was to be sold at auction, and the proceeds equally apportioned. After the decease of his said

wife, the testator further directed "that the residue of his estate, consisting of moneys in the Savings' Bank, rents and the proceeds of sale of fee-simple and leasehold property specified, should be equally divided among his aforementioned five daughters, naming them, or their lawfully begotten issue; and in the event of the death of either of them, without issue, then her proportion was to be equally divided among the survivors," the defendants, McDougalls, were appointed executors. By a codicil, dated 3rd February, 1879, testator desired that the bequests to each of his daughters should be for the sole and separate use of each of them, and not under the control of any husband; in all other respects he confirmed his said will. Testator's wife, Mary Ann, predeceased him, who died in January, 1882. It appears that the daughters were desirous of not selling the landed property, and having arranged among themselves for their respective shares of the estate, a formal deed was accordingly prepared under instructions from the executors, which was executed on the 17th June, 1882, whereby the executors, as so arranged, assigned certain lands to William Mosedale and William Skeans in trust for their respective wives, Isabella and Ellen, daughters aforesaid, for the sole, separate and absolute use and benefit of each as tenants in common, in equal moieties, and in such manner as either of them in her life time or by her last will and testament should direct, and contemporaneously with the said assignment all and each of the aforesaid five daughters, with their respective husbands, executed a full release to the said executors of all their present and future claim on the said estate, having thereby acknowledged the receipt of the full amount of the share to each as entitled in distribution under the said will or otherwise, and since then each has fully enjoyed the same, whether of money or land, apart from the other and others of them.

The petition states that the said Ellen Skeans died on the 7th of July last, without issue; that her husband, the said William Skeans, who took out letters of administration to her estate, wrongfully continues in possession of the said land of his late wife and moneys to the amount of \$550. her allotted share, and that, as she died without issue, the said Wm. Skeans be ordered to deliver up the said land and moneys to the plaintiffs as survivors under the terms of the said will. The plaintiffs, in their evidence taken before me, state and contend they made no arrangement which should interfere with the terms of the said will as regards survivorship on the death of

either without issue; that neither was hindered to spend as she liked in her life time, as it was left in that way, nor was either prohibited from selling land during life, but if there was any balance of the moneys unexpended or property unsold in the event of either dying without issue, in each case it belonged to the survivors and not to the representatives of the deceased. It further appeared that part of the land assigned for the use of the said Ellen Skeans, situate in Adelaide street, St. John's, was leasehold, the term in which expired in May, 1892, but that the said husband obtained a renewal of his late wife's share of it. From my consideration of the contents of the will and codicil, proceedings and evidence, I am inclined to the opinion that the said late wife of the testator who had a life estate in part of the residue, having predeceased him. the period of division was on his death, and that the survivors at that time, each of the said five daughters, absolutely took the whole of their respective legacies. *Cripps vs. Wolcot, 4 Madd. 15*; and the cases cited in note *Y. 2nd Williams on exors, 1471, eighth ed.*—but whatever doubt might exist on this construction of the will, if nothing had occurred in the meantime between the parties interested, I apprehend there can be no question that the deed of arrangement referred to was final and absolute distribution *inter se* of the bequests contained in the will, and that with the full release to the executors, the parties not having made any reservation respecting survivorship as aforesaid, it is now too late, and they are estopped from raising questions which they have amicably disposed of between themselves, besides the evidence of the plaintiffs as given above in the event of the death of either without issue, as regards the conditional nature of their claim, attaching only to any unexpended or undisposed of moneys or property, is altogether inconsistent with the right in remainder set up under the will by survivors to the full corpus of the bequest to either on the happening of the event aforesaid. I may add, the executors made no charge and received no compensation for their trouble in the matter. The plaintiffs must bear the costs of the action.

HON. MR. JUSTICE LITTLE:

The testator died in the year 1882, leaving five daughters him surviving.

After making a specific pecuniary bequest to each of his daughters, he imposes on his estate the payment of an annuity

for the support and maintenance of his wife and gives her the use of his household furniture and dwelling-house in his occupancy during her lifetime. He further directs that on her death the furniture is to be equally divided, or its proceeds, amongst his daughters. Then comes the bequest, in reference to which the present contention arises. It runs as follows: "After the decease of my said wife the residue of my estate, consisting of money and all accumulation of interest thereon, at present deposited in the Savings' Bank, and rents of property, proceeds of sale of fee-simple land and dwelling-house thereon on Flower Hill, and interest in dwelling-house at Lime Kiln Hill, I direct shall be equally divided amongst my aforementioned five daughters (naming them), or their lawfully begotten issue. In the event of the death of one or either . . . without issue, then her proportion is to be equally divided amongst the survivors." By a codicil he desires that the bequests to each daughter shall be for the sole and separate use of each of them and not under the control of any husband.

This will was executed in 1879, and on the death of testator in January, 1882, probate of it was granted to his executors. His wife predeceased him. In the month of April following a distribution of the assets was made amongst the daughters, who were all then living and of full age. A release to the executors and full discharge under the hands and seals of these beneficiaries was duly executed, and by another deed it would appear that all the next of kin had agreed to the allotment of the land, and in accordance with such allotment and agreement it was assigned by the executors to two of the daughters, to be held absolutely by them as tenants in common.

These documents were executed in April, 1882. Subsequently one of the married daughters died without issue. All of the legatees had received and become possessed of their respective shares and interest so bequeathed to each of them.

Now, after the lapse of nine years under the circumstances, a question is raised by one of the daughters as to the construction that should be imposed on the language and terms of the bequest so set out. It is contended on her behalf that the bequest conferred an interest probably greater than a life estate, but subject to being divested on the death of either without issue. That the estate was defeasable on the happening of this contingency, and as the monies are intact the administrator of the estate of the deceased daughter must be regarded as holding them as the equitable trustee of the surviving daughters.

The contentions and position thus advanced by Mr. Horwood were enlarged upon and strongly supported by references to authorities bearing on the application of the rules and principles of construction, considered by him as governing in the interpretation, meaning and effect of the words and terms of the bequest in question. But in view of the evidence, both documentary and oral given at the hearing of the case, and the facts and circumstances thus established, it becomes unnecessary to make any extended reference to the many adjudications applicable in such cases.

It may, however, be observed that from a careful perusal of the terms of the bequest and the context, as well as from the words of the codicil, the testator's intention may be clearly ascertained; and the principles and rules under the authorities may be applied and the legal position of the parties satisfactorily determined.

From a perusal, then, of the bequest, the intention of the testator appears to have been: that, on his wife's death, the proceeds of his estate were to be divided equally amongst his daughters, but if either of them should die without issue, before the death of his wife, then the share of such one so dying should go to and be divided equally among the survivors. If the wife predeceased the testator (which was the case) then the five legatees who survived him were intended to take and become immediately possessed of their respective shares and interests under the bequest.

The survivorship is referable to the death of the testator, the wife having predeceased him, the time of distribution was consequently on his death.

In support of this uniform and reasonable rule, reference may be had to the case of *Stringer vs. Philips*, 1 Eq, cas ab. 293; 1 Cox, P. W. 97 N.; *Rose de vue vs. Hill*, 3 Burr, 1881; *Wilson vs. Baily*, Ja. on Wills, v. 2, p. 723; *Cripps vs. Wolcott*, 4 Maddipel; *Hughton vs. Whitgrave*, 1 J. & W., 146, Ja. Wills, p. 730.

Practically applied as at present, the rule is found to be in accordance with reason and justice. If such a distribution were to be postponed to the happening of the death, without issue, of one of these legatees, what would be done with the common fund in the meantime? How could the beneficiary be restrained from expending or applying the whole of her share to her immediate wants or purposes? However, this contention on the case has been pretty effectually settled by the acts of the parties themselves. In fact, their own agreement, mutually

and sensibly adopted, saves the necessity for further question on the principles of interpretation in the matter.

For we find that in the month of April, in the year 1882, that is, three months after the testator's death, the executors, having furnished the necessary statements and accounts of the affairs and condition of the estate, these parties, together with the husbands of such of them as were then married, duly executed a formal release to the executors of all further liability to them for or on account of any claim the legatees, or either, had or might have on the executors or the estate. This deed recites the fact that the executors have made a distribution of the chattels and effects of the testator among the legatees according to an arrangement made and entered into between them.

Some of these legatees were examined on the hearing of the case and fully confirmed the correctness of the recitals in the deed, and confirmed the averment relative to the mutually satisfactory character of the arrangement concluded by all parties interested under the will. Another of the parties deposed that, if Mrs Skeans had expended the whole amount or proceeds of her share they, the surviving sisters, would be content and not raise any question on the meaning of the bequest. Mrs. Skeans, it appears, died in July last, and a part of the amount received by her is at present in bank, and her husband obtained administration of her estate. Now, after the lapse of over ten years, after such accounting and settlement, the plaintiffs raise this question of the interpretation or meaning of the bequest. In my mind they have effectually determined that question and fortunately set at rest further disputes that might have arisen on it.

They should, therefore, be held bound by their deed; these proceedings should be dismissed and the defendants paid their costs incurred in their defence to this claim.

Mr. Horwood for plaintiffs.

Mr. Morison for defendants.

1893, *April*. HON. SIR F. B. T. CARTER, C. J.

Will—Proof in solemn form—Execution, invalidity of—Signature top of will.

Where the testatrix had executed her will at the top by affixing her mark instead of at the bottom as is customary, it was contended that the will was not duly executed in accordance with the local Wills Act and the law.

Held—The Act does not require the signature to be made at any particular part of the will. The signature at the top of the will fulfills the requirements of the statute.

JOHN WALSH, a son of deceased, applied by petition for letters of administration to her estate to be granted to him, stating that she died in the month of March last (1892), possessed of farm land and other property of the probable value of six hundred dollars, and leaving her surviving petitioner, Andrew, his brother, residing in the United States of America, and four daughters.

That no will of deceased had been filed in the office of the Chief Clerk and Registrar, but petitioner was informed there was a will, or a paper purporting to be such, in the possession of Francis Jackman, a son-in-law of deceased, and that petitioner had good and valid reasons for believing that the said alleged document was not such as could be admitted to probate as the last will and testament of deceased.

A citation in the usual form was issued and served upon the next of kin, to attend before me at a time and place mentioned upon the said petition; in the meantime the document referred to as a will had been filed in the office of the Chief Clerk, and proved in common form on the affidavit of one of the subscribing witnesses. Mr. Scott, Q. C., appeared for petitioner and others interested, and Mr. Carter for Andrew Walsh, the principal legatee, when a day was appointed for proof in solemn form. Besides the three subscribing witnesses to the alleged will, there were four other witnesses examined and cross-examined in proof and contra. On a subsequent day, as arranged, Mr. Scott contended the said document should not be admitted to probate: (1.) That the deceased, at the time when the said document purported to be executed, was from old age and from bodily and mental infirmity incapacitated from making a will such as the law could recognize; (2.) That it was not duly executed in accordance with the requirements of the Local Wills Act, Consolidated Statutes, 1872, and the law, the signature, by her mark, being at the commencement of the will and not at the bottom as is usual, as required by the English Statute of

Wills, and should have been so placed on this document. The witnesses were chiefly examined upon the question of capacity, and the evidence of those who were most competent to testify on that point have fully convinced me that, although the deceased was in a very weakly and infirm condition of body and the act performed shortly before her death, yet that the contents of the alleged will were known to deceased, that she comprehended what she was doing; that it was her spontaneous act without any undue or improper influence, and, moreover, was in accordance with her previously expressed wishes. I have not deemed it necessary to cite any decided cases on this subject which will be found in the text books, such as the first vol. of *Williams on Exors.*; but the conclusion I have arrived at from the sworn and disinterested testimony of several witnesses, in regard to the comprehension of the deceased, will be confirmed on reference to the adjudications.

(2) As to invalidity on the ground insisted upon from insufficient or improper execution, it is enough to state that our Act does not require the signature to be made at any particular part of the will, provided, of course, there be a signature either in the handwriting of the deceased or written by another, with a mark duly attested, as provided for by the Act. There were three witnesses who subscribed their names in the presence of deceased and of each other, who testified that after the document had been written by the witness, John Healy, the name "I, Catherine Walsh, X" was inserted at the top to which she put her mark with a pen guided by Healy. Prior to the recent English statutes respecting wills, it was held that the signature of the deceased at the commencement of a will was sufficient, and it had been so recognized by this court since the passing of the local Act, regard being always had to compliance with the prescribed formalities. In my opinion the document as propounded as a will in this matter has been sustained, and ought to be admitted to probate, but as no executor was appointed, letters of administration, with the will annexed, should be granted upon a proper application to some other person than the petitioner.

I have delayed giving this judgment, but not from any doubt I entertained after hearing the evidence.

Mr. Scott, Q. C., for petitioner.

Mr. Carter for Andrew Walsh, legatee.

1893, April. HON. SIR F. B. T. CARTER, C. J.

Landlord and Tenant—Lease—Destruction of property on land leased, by fire—Surrender of lease by note in writing—Local usage as to right of surrender of lease.

The defendant was the assignee and occupier of certain lands with buildings thereon, situate in the town of St. John's. The buildings were destroyed in July fire, 1892. The defendant in writing, within thirteen days after the happening of the fire, surrendered the premises to the plaintiff. Notwithstanding the surrender, the plaintiff sued for half year's rent. The defendant relied on his right to surrender though no covenant was in the lease providing for such surrender.

Held—Under the English law the defendant would be bound to pay rent (without any exception in case of fire) though the premises were burnt; but there is a local usage or established custom in Newfoundland which gives the right to surrender the premises as he did, and he is released from all obligation to pay rent.

THE parties, through their solicitors, in this action submitted for my consideration certain documents respecting leased land in St. John's, hereinafter referred to, with certain questions for my determination.

It appears by the documents annexed to this case that the Rev. W. Newman, by indenture of the 16th September, 1873, among other parcels, demised to the late Mr. William Kitchen a parcel of land situate on the west side of McBride's hill: That the said William Kitchen by his last will (11th October, 1873) bequeathed "all my right and interest in that parcel of the said land so demised, occupied by James Mulloy, subject, however, to the payment of an annual rent of twenty pounds to my daughter Ellen Ann (now wife of the said Maurice Fenelon), her heirs and assigns, during yearly and every year of the term of years left unexpired, which I shall hold at the time of my decease, of the said premises as his proportion of the ground-rent."

The said William Kitchen, legatee of the said parcel, having died, the testator, by a codicil to the said will, 1877, bequeathed as follows: "In consequence of the death of my late son William, I bequeath to my son Thomas the lands, tenements and premises mentioned in my said will as bequeathed to William, subject to the charges and conditions contained in my said will."

The said Thomas Kitchen, having become possessed of the said premises, afterwards died, and by his will appointed Thos.

J. Murphy executor thereof. On the 23rd January, 1884, the said Thomas J. Murphy, as such executor, by indenture made between himself and the said Maurice Fenelon, assigned to the latter all his right, title and interest as such executor in the said premises, as described in the said indenture, the subject of the bequest aforesaid, for the unexpired term granted by the said first mentioned indenture, at the yearly rent of £50 currency, payable half-yearly, and upon other considerations set out in the said indenture.

The buildings and erections on the said land were wholly destroyed by the fire of the 8th July last (1892). That in consequence of the continued absence from this colony of said Murphy, executor, the plaintiff was appointed administrator *c. t. a. de bonis non* of the estate of her late husband, Thomas Kitchen; that the said M. Fenelon did, in writing, within thirteen days after the said fire, surrender the said premises to her; that the plaintiff as such administrator commenced an action against the defendant on the 18th November last, for the recovery of \$100, a half year's rent of said premises; the defendant in his pleading in defence relied upon his right to surrender as he had done, and paid the proportion of rent so reserved, viz., \$44.63, up to the time of such surrender.

The questions submitted for my determination are:—

(1.) Whether the premises so assigned, having been totally destroyed in the fire of the 8th July, 1892, the defendant had the right, by local usage or otherwise, to surrender to the plaintiff as he did? (2.) Has the defendant to pay to the plaintiff the semi-annual rents mentioned in the said assignment, up to the expiration of the time therein named.

The parties further agreed that I should order and direct for whom judgment should be entered, and as to costs and all other matters relating to the action as if the same had been tried and heard before me sitting without a jury, and subject to re-hearing or appeal as by law provided.

I have given consideration to the questions so submitted, and if I had to decide this matter by the law of England, as I should have felt bound to do if there were no recognized ruling to the contrary, the plaintiff would have been entitled to judgment in her favor, as it is too clearly laid down to be controverted that by the English law where a lessee covenants to pay rent at stated periods (without any exception in case of fire), he is bound to pay it though the house be burnt down, for the land remains, and he might have provided to the contrary by express

stipulation if both parties had so intended, and this rule applies although the lessee's covenant to repair contains an exception in case of fire; and where premises were destroyed by fire during a tenancy under a written agreement and rendered no longer habitable, the landlord was still entitled to recover rent due after the fire in an action for use and occupation.—*Woodfall, Landlord and tenant, 12 Ed., 379*, and cases cited in the notes. But the defendant relies on a usage existing in this country and judicially recognized from rather a remote period, that the destruction of premises by fire relieves the lessee of such premises from all covenants contained in the lease if he think proper to surrender it under the usage or custom of the town (St. John's); it was so decided in the Supreme Court after argument by Chief Justice Forbes in *Newman vs. Meagher et al.*, (reported in the select cases of the court), p. 207. The Chief Justice in that case, which was an action of covenant against assignees for the purpose of compelling them to rebuild certain houses and tenements situate in this town, and which were destroyed by the fire of the 19th of July, 1819, observes "In the case of *Bulley and Carson* it was proved, after a full examination of witnesses who from their long residence in this island must be presumed to have acquired a competent knowledge of its local usages, that the lessee of a house has a right to surrender his lease *in the event of its being destroyed by fire*. This point was again brought before the court in the case of *Cowell vs. Macbriare* and established to its entire satisfaction. Indeed, as a point depending upon its facts, the court could not but feel, from the manner in which the parties produced their witnesses and appealed to the concurrent testimony of every person casually in attendance upon the court, that it was too clear to be disputed, that the lessee of a house, upon its being burnt down, and no express provision made against such a casualty has a right to surrender his lease and discharge himself from all future liability under its covenants." In *Duggan & Mahon vs. Barter Id., 236 (1828)*, the court, while recognizing the usage to be nothing more than a tacit proviso annexed by the custom of the place to every lease that if the house be consumed by fire the tenant shall not be under the obligation of continuing to pay rent, but may give up the ground if he think fit, yet held the surrender must be made in writing, agreeably to *29 Car. 2nd, c. 3, s. 3*. Also the cases *Rex vs. Lilly, p. 428 (1823)*, that the lessee of government ground had the right to surrender under the custom, and *Broom vs. Preston*

& *Stabb, Id. 49 (1825)*, in which an elaborate and interesting judgment was delivered by Chief Justice Tucker in regard to the origin of the usage, and contrasting it with the law of England on the same subject, held that the partial demolition of premises by fire will not entitle the lessee to surrender so as to relieve him from future rent. Yet that an exception of fire in his covenant to repair would relieve him from the obligation to repair, but did not cast the onus of doing so upon the lessor during the term.

After the great fire of June 9th, 1846, I have no recollection of this usage or custom having been challenged in court, and, so far as my remembrance serves me, it had general acquiescence. And even when it was started and assented to in the community, we may reasonably infer there were substantial grounds for its support. In those days the hardy settlers, in the absence of the political institutions of the present time, were quite capable of establishing laws known as usages or customs with due regard to their mutual interests. It is probable that the frequent calamitous fires, where the buildings were of wood construction, in the first place led to a general consensus of the population upon the subject, which was afterwards observed as obligatory on both the landed proprietor and tenant, and regarded as incorporated in all their contracts as if expressly so stated therein. And after all it is not an unreasonable usage, as apparently there is infinitely more of equity in its sustainment than in the rigorous application of the principle of the English law, which compels a tenant to pay for what he does not enjoy, and of which he has been deprived by a destructive element that he could not control. Of course parties can always protect themselves by their covenants and written agreements, and it is not unusual to insert a clause providing for surrender within a certain number of days in the event of fire. The custom is now so well established in law as to require the intervention of the legislature to abrogate it, if such should be deemed to be desirable in the interests of the public.

It is advisable that the contract should contain a stipulation in the event of fire as a question may arise as to the time within which the written notice of surrender can be effectually given.

In answer to the questions submitted, I have to say: (1). That the defendant had by established usage or custom the right to surrender the premises, as he did after the fire of July, 1892;

(2). The defendant is released from all obligation to pay the rent during the unexpired term for the destroyed premises, after the payment made at the time of surrender; (3). Judgment to be entered for the defendant, each party paying his and her own costs.

Although it is not stated in the case, I believe it is the fact that the legal representatives of the late William Kitchen surrendered all the demised premises, which was accepted by the proprietor or ground landlord. I may add that Mr. Justice Little has taken no part in this case, having been a co-executor of the will of the said late William Kitchen, and acted in that position.

Mr. Furlong for plaintiff.

Mr. Kent, Q. C., for defendant.

LYNCH v. TRAINOR AND AYLWARD.

1893, *April*. CARTER, C. J.; LITTLE, J.

Mechanics' Lien Act—Construction of—Notice by workmen to owners of property of non-payment of wages by contractor—Proceedings "in rem" and "in personam."

A contractor agreed to build a premises for the defendants, the contractor to pay all wages for labor. The contractor became insolvent after having obtained from the defendants the full amount of his contract price. The defendants had to pay to another party an additional sum to complete premises. The plaintiff was employed on the work by the contractor, and when the latter became insolvent was owed a portion of his wages; no written notice under the Mechanics' Lien Act was given the defendants by the plaintiff, though the former were told that moneys were weekly due them by the contractor. In an action by plaintiff against the defendants judgment was given in his favor. The defendants appealed, and claimed that they could only be liable, if liable at all, for a proportionate share of the sum they were entitled to retain under the Act; they also relied on the want of notice, and the absence of jurisdiction in the court below.

Held—That the judgment of the court below could not be confirmed. The action was by summons *in personam* against the owner, which the Act does not authorize. The whole scope of the Act has reference to proceedings *in rem*, which the term lien implies.

THIS is an appeal from the Central District Court, with the assent of the judge who gave judgment against the defendants (appellants) under the Mechanics' Lien Act, 53 Vic, cap. 18.

The evidence establishes there was due the plaintiff \$13.50 for wages, as a carpenter, who worked with one Jephson, a contractor with the defendants for the building of the exterior of a house, which amount with other sums due workmen on the same building aggregate \$63.70. The contract price was \$300, which the contractor has been paid, although the contract has not been fully performed. The contractor has been declared insolvent. The plaintiff stated he knew nothing about the contract, that he had often told the defendants or one of them that money was kept back from them every week. This the defendant (Trainor) admits, and told the workmen Jephson had to sign the receipts; and further, to look out for their wages. Jephson stated he had not a day's pay for himself.

Judgment was given for the amount claimed (\$13.50), being at the rate of twelve days' wages, and appeal was granted on the understanding between counsel for the parties that the claim of one Dowden for \$17.98, and one Davis for \$14.28, workmen with the plaintiff, be governed by the decision of the Supreme Court in this action.

Mr. Scott's, Q.C., grounds of appeal, and as he contended at the hearing on behalf of the defendants, are that if at all liable they were only so for the proportionate part of \$30, at 10 per cent. on the contract price (\$300), which \$30 under the Act was to be appropriated in the discharge of all claims of lien on the building, and that the contractor had been paid the full \$300 before the notice of the lien claims, as required by the Act; also that the sum claimed, and upon which judgment was given, exceeded the proportion due plaintiff, and that the amount involved was beyond the jurisdiction of the Central District Court, viz.: £50.

As this lien of mechanics and others introduces a novel feature into our law and legislation unknown to English law, I have abstracted the several sections of this rather lengthy and somewhat puzzling Act for the better understanding of its scope and bearing on the interests of those more immediately affected by its operation, and as we may expect questions arising under it to be submitted to us from time to time for solution.

The proceeding in this action is by original summons *in personam* against the owner, which I cannot perceive is authorized by the Act. The 28th section, which confers jurisdiction on the court of the district within which the *land* charged is situate, and where the amounts of the claims in respect of any

lien is within the jurisdiction of such court, proceedings to recover the same therein may be taken according to its usual procedure by judgment and execution; after this the same section thus proceeds: "And the same district court judge, when the amount of the lien is within his jurisdiction, may order a summons to issue and cite the parties before him, and may order accounts to be taken and all necessary inquiries to be made, and, *in default of payment*, may direct the sale of the estate and interest charged, and such further proceedings taken as the judge directs."

In no part is it provided that the owner shall be personally liable to the workman for any lien claim, and the whole scope of the Act has reference to a proceeding *in rem*, which the term lien implies. "Judgment and execution" appear in the 28th section quoted, and "execution" in the 30th section, sub-section 6, but *against whom* in either case, if *in personam*, is not stated as is ordinary, to seize all property of a judgment debtor, unless it be intended to seize only the property upon which the lien is created for realization as may be directed, which would be consistent. As regards the claim of a fisherman against the receiver of a voyage, the Act cap. 90 of the Consolidated Statutes, 1872, expressly gives a right of action for money had and received, which is a material distinction from the present proceeding. I mention this because reference is made in the judgment below, from which it may be inferred the proceedings might be regarded as analogous. If the owner were held to be personally liable the claimant could pursue his claim against his employer, owner not in privity, and also against the *res*, and if against the owner *in personam*, his property unconnected with the transaction would be liable to respond for the discharge of the lien, which by the Act is expressly given upon his interest in the land and building the work was performed. This does not come within the purview of the enactment, nor does it seem reasonable to infer it was the intention of the legislature.

The fourth section gives a lien to the classes mentioned in it, limited in amount to the sum justly due to the persons entitled to it, sub-section three of which regulates the nature of the interest of the owner upon which the lien shall operate where there is a prior mortgage or encumbrance. Without prejudice to any lien under the foregoing, section six gives a lien for wages to the extent of the interest of the owner upon the building, erection or mine, and the land occupied or en-

gaged therewith, for such wages, not exceeding twelve days or a balance equal thereto for twelve days, and upon a railway or mine thirty days.

Sect. 7.—In all cases the owner shall, in the absence of a stipulation to the contrary, be entitled to retain for a period of thirty days after the completion of the contract, ten per cent. of the price to be paid to the contractor.

Sect. 9.—All payments up to ninety per cent. of the work, &c., as defined by section four, made in good faith to the contractor, &c., *before notice in writing* by the lien claimant shall be a discharge *pro tanto* of such claim. This section not to apply if the payments made for the purpose of defeating the lien. The lien for twelve or thirty days' wages (sub-section two) shall have priority over all other claims, and of that of the owner for non-completion by the contractor.

Sect. 10.—“Save as provided herein, the lien shall not attach to make the owner liable to a greater sum than payable by him to contractor.” Sub-section six of section thirty provides where there are several liens under the Act upon the same property, each class (subject to sections five, nine and eleven) to rank *pari passu* and *pro rata*.

If the proper proceeding had been taken under the 28th or 30th sections, then the several lien claims could have been adjusted and directions given for realization as prescribed, and the proceeds of any sale distributed *pro rata*, as provided in section eleven and section thirty, sub-section six. The wages' claimants would have had priority over all other claims of lien for twelve days' pay, or equivalent in this case to the ten per cent. or \$30. Section four might be construed to apply for their full claim, if there were any balance due the contractor sufficient therefor and no prior encumbrance registered, but in this case it has not application to sustain the judgment below. If the judgment below can stand, the defendant, even if liable *in personam*, would have to pay more than the contract price, while the Act, as I have shewn, expressly declares the owner shall not be liable to any amount in excess of that.

Although unable to confirm the judgment of the Central District Court from the view I have taken of the object and provisions of the Act, yet as I regard the principle of it to be of a salutary character, having had existence in the Dominion of Canada and the United States, and reported as approved of in operation, and if the proceedings had been otherwise instituted, the lien of the plaintiff and the other workmen for the

twelve days would have been valid and enforceable,—it would be only fair for the owners to pay each his proportionate part of the \$30.

I may add that I have considered the verbal notice to the owners of the non-payment of the wages by the contractors. At the same time it must not be forgotten that it was optional with the workmen to continue labouring when unpaid. I also think the Act is somewhat complex in its present form, and that it might be advantageously simplified. No costs.

MR. JUSTICE LITTLE:

These proceedings are brought before this Court on an appeal from a judgment rendered in the Central District Court against the defendants, appellants, in an action brought against them by the plaintiff, under the Mechanics' Lien Act, for the recovery of \$13.50 for work and labor admitted to have been done on the house of the appellants.

From the evidence on the record it appears that one Jephson contracted with defendants, for the sum of \$300 to be paid him, to build and construct the outer part of a dwelling-house for them, they supplying the material and the contractor having to provide and pay for all labour.

The contractor failed to fulfil his agreement, abandoned the work, and, becoming involved in difficulties, ultimately became insolvent. He had received from defendants the \$300, by instalments, whilst he was engaged on the work, and leaving it unfinished, they were obliged to pay another party \$30 for its completion.

The plaintiff was employed by the contractor, and, with three other carpenters, assisted in constructing the building, and when the work was abandoned there was due to him on account of his labor the sum for which judgment was given in the District Court, viz., \$13 50, which with the claims of the other carpenters made up the sum of \$63.76 due by the contractor to them as lien claimants. No written notice was given to the owners of the property of the existence of these claims, but the defendants were verbally informed by plaintiff, whilst the work was being performed, that the contractor kept back money from them every week, and was told by appellants that Jephson had to sign the receipt for the amounts paid him by them, and that plaintiff and the others should look out for their wages.

The defendants' grounds of appeal are that, if at all liable, it would only be for the plaintiff's proportionate share of the \$30, which, under the 7th sec. of the Mechanics' Lien Act (53 Vic., cap. 18), the owner was entitled to retain, and which would have to be divided equally with the other claimants for wages against the defendants. They also relied on the absence of any privity of contract between them and the plaintiff, the want of notice of such claims, and that as the aggregate of the claims thus asserted exceeded \$50, the court had no jurisdiction to entertain them.

Thus briefly stated, we have all the grounds of dispute upon which the parties rest their respective contentions, and we are confined entirely in determining their position by the meaning and effect of the provisions of the statute under which the proceedings were initiated and so far concluded in the court below.

Apt observations have been made as to the novelty of the statute, our want of acquaintance with its practical operation, and the consequent absence of precedent in our courts in connection with it, for guidance in ascertaining or applying the meaning of its apparently obscure or complex provisions.

Doubtless, on becoming familiarized with its character and provisions, and the effect of their application, it will be more fully appreciated and in time found to safeguard these interests the legislature had solely in view when importing it into our statute law.

It will be found, on reference to the Ontario statutes, that our Act is almost, *ipsissimis verbis*, a transcript of the Mechanics' Lien Act of that province, which runs on the same lines with similar acts long in operation in the United States.

Obviously, it is by the plain and grammatical meaning of the terms of the Act we are to be governed in determining the character of the claim thus statutably created, and the nature of the remedy provided for its protection and enforcement.— On turning, then, to the Act to ascertain how the lien may be created, we find by the third section it provides that unless a party contracts himself out of the operation of the Act, if he, being a mechanic, labourer, or other person contributing his labour or materials to the construction or furnishing of any building, work or structure, he shall by virtue thereof have a *lien*, for the price of the work or materials, upon the building or structure and the lands belonging or appurtenant thereto. By the fifth section it further appears that this lien shall

attach upon the estate and interest of the owner in the building or erection; and also, further on, it enacts that, if the building be on leasehold land, the fee-simple thereof may, under certain conditions, be made subject to such lien, and reference is also made to the charging of lands upon which any such work is executed, which may have been previously mortgaged or encumbered; and to further emphasize the impersonality of the claim or security thus created, it is further observable that for the security of the wages' claimant under section six, the lien so given is declared to attach upon the estate or interest of the wife when the labor claimed for is done for or on account of the husband in respect of a building on a property which may be found to belong to the wife.

Expressly then, the Act in these sections declares the nature of the lien, the objects to which it attaches, and the nature of the charge it imposes

The same principle pervades the entire Act, and it will be found, as its title imports, that it creates a collateral security and indemnity to the mechanic, labourer or material man, by giving him a claim, hold or security on the property on which his labour or materials are expended, in addition to the liability of the contractor to him as his immediate debtor; whilst at the same time the owner of the building or property is exempt from personal liability.

This view of the Act, the meaning attaching to its terms, or their legal operation, is strengthened, if not fully confirmed, by the following extract from the comments on this subject by a well-known American text writer on the law of personal property: he states that "under the head of statutory liens are to be particularly mentioned the Mechanics' Lien laws, now so common in every part of this country, which permit masons, mechanics and laborers, generally, to enforce their demands for work and materials furnished, by a sort of summary procedure *in rem*, against the buildings and land on which the indebtedness occurred. This legislation is extending to persons excluded by operation of the common law from the right of lien on property for their demands, and confers on lien claimants a speedy and somewhat inexpensive method of enforcing their claims by sale through judicial intervention."—*Schur., Per. Kly. Vs. I, Sec. 393.*

Viewing then the terms of the Act, the principle governing in the matter of liability, and, on the other hand, the fact of the initial step in this cause being by summons and claim

against the defendants individually and the proceedings subsequently taken being all in *personam*, I fail to see how the judgment below can be affirmed. At the same time it must be noted that under another course of proceeding a claim on the part of the plaintiff for twelve days' wages would be maintainable and payable ratably out of the ten per cent. the owner should reserve out of the amount of the contract to meet such a contingency as the present. I consider that, under the 28th section, the District Court had jurisdiction over the case, and that it was unnecessary to shew that any such privity existed between the parties as that contended for by defendants' counsel in order to enable the lien claimant to recover against them.

It is apparent then that these proceedings were wrongly instituted in *personam*, and that no such individual or personal liability was intended to be created under the operation of the statute. If such a form of procedure were admissible the enforcement of the lien might be made to extend to and effect not alone the land or property on which the labor was expended, but all or any property of the owner within the jurisdiction of the court, and which might be levied on in execution of the judgment.

This would be an entire perversion of the principle governing in all cases of lien, whether at common law or by statute.

I am, therefore, of opinion that on this ground alone the judgment appealed from cannot be sustained, aside from the matters of detail raised at the argument of the grounds of appeal.

For obvious reasons no costs should be allowed the parties.

Mr Emerson, Q. C., for plaintiff.

Mr. Scott, Q. C., for defendants.

1893, *May*. HON. MR. JUSTICE LITTLE.

Contract—Conveyance of fishermen from Labrador—Fares to be charged—Overcrowding of passengers—Act respecting passenger steamers—Construction of—Shipwrecked crews, what are ?

The defendant, by a note in writing, had agreed with the plaintiff company to be responsible for the payment of the passage money, at the regular rates, of a number of fishermen whom he was bound under agreement to convey from the Labrador to their homes. The company conveyed the men home. The defendant refused payment of the regular fares charged, and alleged (a) That under the agreement (which was destroyed) he had stipulated that he would pay only in the event of the Newfoundland government refusing payment; (b) That the latter was liable as the men were shipwrecked men; (c) That the refusal of the government was a condition precedent to his being sued; (d) That the agreement as a whole must fail as it arose out of an unlawful contract which was to convey more men than by law the ship was allowed.

Held—(1). There was no evidence to show any such condition had been attached to the agreement as that claimed; (2). The men were not shipwrecked men, as their vessel had been lost before their fishing voyage commenced, and they had already contributed from their voyage their per capita contribution for their passage money home; (3). The provisions of 41 Vic., cap. 14, did not apply, as there was evidence that the time, occasion and circumstances relieved the plaintiffs from an observance of the provisions of that Act; (4). Owing to the overcrowding of the ship and the lack of accommodation the plaintiffs were not entitled to full passenger rates for that portion of the passage where the overcrowding existed.

THIS action was taken to recover from the defendant the sum of \$1,252, for the conveyance of eighty passengers from Winsor's Harbor, on the coast of Labrador, to Harbor Grace. A special jury had been empannelled for the trial of the cause, but owing to several postponements of the trial mainly attributed to the illness of the defendant and his inability to be in attendance, the services of the jury were dispensed with and the cause was agreed to be tried by the judge.

From the evidence, which was principally taken *de bene esse*, it appeared that defendant is a large supplier and extensively engaged in fishery operations on the Labrador, and in the spring of the year 1891 brought down in his own vessels many of these planters, fishermen and servants supplied by him. According to the prevailing and usual custom he had engaged to provide passages for these persons on their return to their homes in the fall of the year; but it appeared that his vessel, the *Sneezer*, by which some of these people had been brought down to Labrador, was lost on entering Winsor's Harbor, where defendant's stores and fishing premises were situated. In consequence of

this loss he was obliged to procure passages for some seventy-five or eighty of these people on board the steamers of the plaintiff company in the fall of the year; and, after their voyages had been put off to him, Captain Kane, of the *Curlew*, one of the company's boats, declined taking those people as shipwrecked crews or at the rate chargeable for shipwrecked people, and very properly required and obtained from defendant a written undertaking that he would be accountable for the payment of their passage money to their destination. The captain deposes that the rate so given was to the purport following, viz.: "That defendant would be personally responsible for the passages of these men according to the daily rates of the ship and not as shipwrecked crews." On receipt of this the captain took them on board at Winsor's Harbor and conveyed them to Battle Harbor. There was on the ship ample room and accommodation for them as steerage passengers. They were then received on board the *Volunteer*, another of the plaintiff company's boats engaged in the coastal mail service, and carried to Harbor Grace, still as steerage passengers.

From the evidence of the purser of this latter vessel it would appear that he received from Captain Kane a list of the crews, together with a letter for the company containing the agreement or written undertaking of the defendant. The purser's remembrance of its contents or purport differs from that of Captain Kane. The former states it read as follows: "I hereby agree, if the government would not pay the passage money from Winsor's Harbor to Harbor Grace, that he (John Hennessey) would." He further states in his evidence that there were on the trip from Battle Harbor over three hundred men and women on board the *Volunteer*. The letter and list were given by the purser to Mr. Lash, in the employ of the plaintiff company. The number of the steerage passengers the *Volunteer* could conveniently carry was understood to be about ninety, and for that number accommodation was provided, and "when there would be a surplus number of steerage passengers they would accommodate one another"; the first on board would get a berth and secure it, the rest or surplus would be accommodated in the hold. And he also deposed that this condition of things existed pretty well on the three trips from Battle Harbor; that Captain Kane and Spracklin, the purser of the *Curlew*, informed him that the crews of Hennessey's were shipwrecked. He further deposed that he collected no passage money from these shipwrecked men, but he did collect from all

the other steerage passengers, and that all those who paid for their berths came on board before the shipwrecked passengers were taken, and kept their berths until they arrived at their destination. It would also appear that other steerage passengers who came on board subsequently and paid for their passages could not be secured with berths; the crowd was largely in excess of the berth accommodation on board. But no inconvenience arose in cooking and supplying the regular meals to all on board. From the testimony of Mr. Lash it appeared that the regular charge, and that made in the present case, is at the rate of one dollar per day for each steerage passenger on board the company's boats, and that the names of these crews were entered by him in the company's books as "shipwrecked persons"; that from his recollection of the contents of the note the defendant undertook, if the government did not pay for these people, he (the defendant) would. The passage money or rate for shipwrecked crews charged by the plaintiff company is seventy-two cents per day for each passenger. Mr. Johnson deposed to the loss in the fire of 1892 of the papers and written undertaking of defendant in this matter whilst in his possession.

The defence consisted of a denial of any liability of defendant until the government had declined paying the passages of these persons now charged for; that on that condition alone was the undertaking or guarantee given by defendant.

The refusal to pay on the part of the government was on motion for a non-suit urged as a condition precedent to the incurring of the liability in question; that no evidence was at all given of any such refusal being given; that such was the agreement, and no unqualified promise was made by defendant as stated in evidence.

Now, although the witnesses did not exactly agree in their statement of what they remembered to be the precise terms or wording of the undertaking, still there is no doubt of the general contents of the note, and that it was a promise made in writing by defendant to hold himself personally bound to pay the amount or charge for the passages of the crews so sent up from Labrador by him. It is clear from the evidence that the conditions stated by Captain Kane, through his purser, to defendant were, as directed, committed to writing and were contained in the memorandum in question. It was previously distinctly understood that these people would not be taken as shipwrecked men. And, in face of the fact that their vessel having been lost before the commencement of their fishing and

that she was used as a coastal vessel, partly to carry them and their gear probably to the Labrador, it is somewhat difficult to discover how they could reasonably be expected to pass as shipwrecked crews and be conveyed to their homes on government account, whilst, as deposed by Captain Kane, there had been reserved out of the proceeds of their voyage twenty-five cents per quintal to defray their passages to and from Labrador and the expenses incidental thereto. There should be no question as there can be no doubt about the personal obligation assumed by the defendant in this matter, nor of his liability to the plaintiff company for the payment of the passages of these people. He in the first place assumed this obligation as between himself and these people whom he brought to the Labrador, and was indemnified for the cost and liability thus assumed, and that liability was continued under the arrangement made with Captain Kane at Winsor's Harbor.

The alternative ground upon which defendant rested his claim to non-liability and urged in the motion for a non-suit must also be regarded as equally untenable. It was contended that this arrangement or undertaking rested upon an unlawful agreement; that as it sprung out of an illegal transaction it should entirely fail. This wrongful or illegal act was in the employment of these steamers in carrying a greater number of passengers than they were permitted to carry under the statute law of this colony. This contention rested wholly on the provisions of the Act 41 Vic., cap. 14, entitled "An Act respecting Passenger Steamers," which provides for the appointment of surveyors to survey and inspect all steamers coast-wise, and to fix the number of passengers each steamer may be considered suitable and capable of properly accommodating, &c., and making it penal upon the master or owner, if a greater number of passengers be carried than that allowed by the certificate which might be granted by the surveyors, &c. Now, the provisions of this Act have never been called into practical operation.

The necessary and prescribed requisites to give life and operation to the Act do not exist, and no official appointment of surveyors has ever been made or other like action taken to give the provisions of the Act practical effect.

And, even if its terms were in operation and applicable to the circumstances presented in this cause, it will be found that by the third section that the master or owner would not incur any penalty under the Act or infringe its provisions, if the time, occasion and circumstances warranted the carrying of a greater

number than the surveyor's certificate permitted. One of the witnesses in the case deposed that if these people had failed to procure passages by these steamers they would have been obliged to take possession of the stores of the supplying merchant doing business at Battle Harbor. There, in the words of the Act, the time, occasion and circumstances would have relieved the plaintiff company from an observance of the provisions of that Act if its provisions had been in operation at the time. The defence, as presented on the record, therefore entirely fails.

We cannot but be impressed with the reference made to the evidence as to the kind of accommodation these people were, as steerage passengers, entitled to have on board both these steamers. It is evident they had quite sufficient room, and were in other respects well provided for on board the *Curlew* on the trip from Winsor's Harbor to Battle Harbor, but from thence to Harbor Grace they had not, nor could they expect to have, similar accommodation. The over-crowded state of the ship placed it beyond their reach to have that accommodation they would be entitled to under ordinary circumstances at the rates payable by steerage passengers.

Under all of the circumstances and in view of the evidence of the purser of the *Volunteer*, it is clear that, owing to the condition in which these passengers were necessarily placed, some reduction should be made on the rates charged for their conveyance.

I consider that the amounts charged for the passages from Winsor's Harbor to Battle Harbor should be allowed in full; but that the plaintiff company should only be allowed for these eighty so-called shipwrecked passengers the sum of seventy-five cents each per day during the time they were on board the *Volunteer* on the trip from Battle Harbor to Harbor Grace.

Let the necessary calculations be made and judgments entered accordingly in favour of the plaintiff company by either, with costs of all the proceedings had in the cause.

Mr. Johnson, Q. C., for plaintiffs.

Mr. Emerson, Q. C., for defendant.

1893, May. HON. MR. JUSTICE LITTLE

Contract—Master and servant—Parol agreement for commission outside wages—Construction of.

The defendant entered into an agreement with the plaintiff, who had previously served him as an apprentice, at a certain wage per day and an additional bonus in the shape of a commission on goods sold, to serve him as foreman in his business as an upholsterer. He served him for one year and then claimed his commission, contending he was entitled to five per cent. as per agreement on the gross proceeds of the business. This the defendant denied, and claimed the agreement for commission was only to attach to the net profits of the business. The agreement was entirely parol and there was no witness. In an action for the amount of the commission—

Held—That in the absence of any corroborative evidence on either side, the conclusion was in favour of the defendant, as the wages paid the plaintiff, added to the commission which the defendant admitted was due, would form a salary in keeping with the position of plaintiff and the wage earned by those in similar positions.

In this action the plaintiff's claim arises out of an agreement alleged to have been entered into with the defendant, under which the plaintiff was to serve the defendant as foreman in and over his furniture factory during the year 1891, and did so serve him for that year up to the 21st January, 1892.

It appeared from the evidence that the plaintiff had previously served the defendant as an apprentice in the trade and business of furniture making and upholstery; that a few months before the completion of his apprenticeship, viz., in October, 1890, the defendant contemplating an alteration in his trade and business, proposed specific terms to the plaintiff to be acted on after the expiry of his said term of service.—By these terms the plaintiff should serve the defendant as foreman and take charge of his manufacturing department about being carried on in the new factory in Bell street. For the service so to be rendered he was to be allowed and paid by the defendant \$6.50 per week, and five per cent. on the gross receipts or on the proceeds of sales of all articles of furniture manufactured in the factory and sold and realized by defendant, as well as on the cost and value of all repairs done in the factory on and to articles repaired or altered therein. It was further stated to have been agreed on that the said allowance of five per cent. should also cover and be paid on the selling cost or proceeds of sale of all furniture or upholstery imported by defendant and disposed of by him in his trade. These stipulations were repeated again in December following between the

parties; and on the 2nd or 3rd of January following plaintiff entered on the performance of this agreement as such foreman, and so continued up to the 20th of January, 1892.

The agreement was entirely by parol, and no third person was present at its making. Under it the plaintiff received the weekly stipend, but was not paid the percentage, and now sues for its recovery—the claim amounting in all to \$381 82.

It is unnecessary to enter into the minutiae of the evidence taken by me of the circumstances and incidents attending the service, nor to the cause of its discontinuance.

The pleadings shewed an absolute denial by defendant of the existence of any such agreement as that set out. On the hearing of the cause it was not denied that plaintiff was an efficient and most capable tradesman, and as such performed his work satisfactorily.

The contention between the parties arises clearly from a misunderstanding or misapprehension of the meaning attached by each party to the allowance of five per cent., and the existence of its application. Unfortunately, it appears, their agreement or its terms were not directly known to any third party to admit of such knowledge being available as evidence at the trial. The defendant, in his evidence, positively denies that the five per cent. was to be allowed as claimed by the plaintiff, but that it was to be allowed and paid on the net profits made on all furniture so manufactured and sold or repaired; nor was it agreed, as contended for by plaintiff, that such allowance was also to extend to imported furniture sold by defendant in his establishment or factory.

Viewing the characters of the parties and the absence of any imputation of intentional misconstruction of the terms of their agreement by either party, it would be difficult to decide which statement the greater evidence or reliance should be given without resorting to other matters in evidence connected with the fulfillment of their contractual obligations. We may consequently turn to these, and we find that plaintiff was paid wages for the preceding year at the rate of \$5 per week; under his alleged agreement he would, therefore, receive an increase of \$1.80, or \$6.80 per week. This would be an increase of his past year's wages of \$93.60 on this item alone, or \$353.60 as fixed wages for the year. Then we have his claim for percentage on the gross amount of sales; taking them to be, as stated in evidence, about \$5,000 for the year, would yield him \$250, giving him for his first year after his apprenticeship an allow-

ance of \$603.60. This would appear to be a liberal wage out of a limited business, subject to so many incidental charges, such as wages, rent, &c. Now, we have it in evidence from Burke, defendant's present foreman, who is admitted by plaintiff and defendant to be a most efficient and skilled workman of thirty-five year's experience in the trade, that generally one dollar per day would be fair wages for a young man in that business and just out of his time—and he now receives nine dollars per week as foreman.

The plaintiff, moreover, admitted that, during the currency of the first quarter of the year he was aware that his view or understanding of the agreement was not in accord with that held by the defendant.

From all the circumstances and evidentiary facts, one must be impressed with the reasonableness and firmness of the statement and contention of defendant, as embodying the real intentions of the parties on entering the agreement or arrangement for the performance of the services for which compensation is sued for.

I therefore conclude that the five per cent. commission or allowance referred to was to be calculated on the net profits, and not on the gross amount of sales. If the parties are unable to agree among themselves on the amount this would produce to the plaintiff, I shall order a reference of the matter to Mr. McNeily for further investigation, and on his report, if approved of, judgment will be signed for such amount as may be found due to the plaintiff.

1893, *May*. HON. SIR F. B. T. CARTER, C. J.

Vendor and purchaser—Conditions of sale—Goods at risk of vendor—Destruction of goods—Reasonable time for delivery—Statute of Frauds.

On the 23rd June, 1892, a contract was entered into between the plaintiff and defendant for the purchase of 1,700 quintals of fish, to be taken delivery of after being weighed and culled from the plaintiff's store. A portion of the fish was delivered to the defendant and taken away by him. On the 8th of July the balance remaining undelivered was destroyed by fire in the plaintiff's store, and had not been weighed or culled. In an action by the plaintiff for the price and value of the undelivered portion of the fish—

Held—When anything remains to be done to the goods for the purpose of ascertaining price, such as by weighing or culling, when the price depends on the quantity and quality, the performance of these things shall be a condition precedent to the transfer of the property, unless the contract discloses a different intention. Upon a sale, the property will continue at the risk of the vendor until everything has been done which was required to be done by the conditions of the sale.

THIS is an action to recover \$3,896.20, the value of nine hundred and seventy-nine quintals of codfish, of different qualities, alleged to have been bargained sold and delivered. The defendants denied the ordering and delivery, and also relied upon the statute of frauds. Reply in the affirmative and issue.

The case was tried before me and a special jury in the last December term, 1892, and from the evidence it appeared that, after negotiations between the plaintiff and Mr. F. Goodridge, a defendant, on the 23rd June last, by sale note produced, the defendants purchased from the plaintiff 1,700 quintals of codfish, winter caught, spring cure and store, at certain prices and terms mentioned, 1,100 of which was subject to safe arrival. At this time there were about six hundred and ten quintals in store in two bulks, landed from the *Alice Mande*, which had not been culled; defendant, the said F. Goodridge, saw and approved. Plaintiff was expecting about 1,100 quintals more from the westward by the *Ethel Blanche*, and both lots were included in the sale note to be taken from the store. Plaintiff shortly afterwards left the colony, before which there had been no delivery. In taking from the store, he said, that fish was always weighed. Mr. Geo. Neal was agent for plaintiff during his absence who stated the *Ethel Blanche* arrived on the 23rd June and the *Amanda* about the same time, and their cargoes were placed in the store in separate bulks. On the 28th June the *Amanda's* cargo was verbally agreed, between Neal and Goodridge, to be sold and purchased on the same terms as the

first, but there was no sale note in writing; Neal described particulars as regards dates of delivery, and the quantity undelivered of the three cargoes which was destroyed in the store by the fire of the 8th July.

An account of the deliveries and prices was sent to the defendants, amounting to \$5,758.80, which, on the 5th July, was paid for by note at four months, as by agreement. Neal sent a messenger to defendants to take delivery of the remainder, which he thinks was the day before the fire, Thursday, 7th July; Goodridge says it was either that day or the day of the fire, who replied that, if Neal did not object, they would commence Monday then next, as they had a vessel on the dock they were about loading. This was apparently satisfactory to both. The defendants had their cullers in the store at the time of delivery, and the fish was put on carts for removal after it had been culled and weighed according to the usual course and as required to be done in such purchases. This had not been done with the balance of the cargoes remaining in the store at the time of the fire. By letter, of date 11th August, from plaintiff, enclosing account for \$3,896.20, and requesting payment, the defendants replied on the 13th August acknowledging its receipt on that day, that they had settled for all the fish received, were surprised at the demand and declined payment.

Mr. Kent, Q. C., moved for nonsuit, on the grounds that there had been no appropriation of the property, as the culling and weighing had not been performed, and also upon the statute of frauds, as regards the fish from the *Amanda*. This motion I declined to grant, and the case went to the jury in the usual way, the defendant, said F. Goodridge, having been examined on the defence.

To the jury I recapitulated all the substantial facts and the contentions of the parties, and having explained the law, to which I shall presently refer, told them it was in evidence there was no culling or weighing of the undelivered part of the fish remaining and destroyed by the fire in the store, and if that were proved to be usual and required and they were satisfied on these points, then their verdict should be in favor of the defendants; but if they could be satisfied from the contract and evidence that there was such an appropriation and vesting of the fish as to confer the dominion of the property on the defendants and it remained at their risk, then their verdict should be in favor of the plaintiff. The jury found for the defendants. Plaintiff's counsel afterwards moved for a new

trial upon the grounds that the verdict was contrary to the evidence and misdirection, upon which counsel were heard before the court on both sides.

The rule of law from numerous adjudications is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing vests in the vendee so as to cast on the purchaser all further risk; but when anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring or testing the goods, when their price is to depend upon the quantity and quality, the performance of these things shall be considered a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in a state in which they ought to be accepted.—*Benjamin on Sales*, 4th ed., p. 278, 279; *Harison vs. Meyer*, 6 East., 614; *Rugg v. Minett*, 11 East., 210; *Simmons v. Swift*, 5 B. & C. 857; *Tausley v. Turner*, 2 Bing., N. C., 151, &c. There may be, and have been cases, in which the property would vest in the purchaser and be at his risk, although something remained to be done, but it must so appear by the terms of the contract that such was the intention—*Castle v. Playford* L. R. 7, Ex. 98, reversing the decision in the same case in L. R. 5, Ex. 166; *Turley v. Bates*, 2 H. & C., 200 S. C.; *Martineau v. Kitching*, L. R. 7, 2 B., 436, &c.; *Addison on Contracts*, 8th ed., 932.

In *Ridley v. Trustees of Steele*, 1858, which was an action of trover, tried in this Court, it appeared the plaintiff had purchased from Steele a large quantity of fish, which was in bulk in the store of the latter. The bulks had been identified and quality approved of, and notes for a large amount given, as arranged for before the delivery. This property, while in store, was transferred to trustees for creditors, and it was held, as the fish had not been culled or weighed to ascertain quantity, quality and price, the property had not vested, and judgment was given against the plaintiffs' purchasers. In that, as in the present case, the property was identified and approved, and no question was raised as to the subject of the sale and purchase as is frequently the case under the 17th section of the Statute of Frauds, as regards acceptance and receipt.

A distinction must be observed between a sale by measure, cullage or weight, requiring the measuring, culling or weighing to be accomplished for the purpose of determining and fixing the price, and a sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty

of the weight or quantity, where the weighing, measuring or culling, as the case may be, is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for.—*Addison, Note 2, 932*. Such, however, was not this case.

In the select cases of the Supreme Court—*Henderson vs. Brown, Hoyles & Co., 90, (1818)*—which was an action to recover the value of eight casks of molasses consumed in the fire of November, 1817. The defence was that as the price was to depend upon gauging, which was to be done before delivery, the sale had not been perfected. And, although in that case the molasses had been gauged a few days before upon being delivered to the plaintiff, the court held that argument was not tenable, and that as all had not been done which ought to have been done between the parties to the action, the court could not distinguish that case from those of *Harison vs. Meyer*, and *Rugg vs. Minnett, supra*, which are still cited as leading cases.

It will, therefore, be observed that from an early period the same principle of law was recognized as it is by the courts at the present, and that nothing has been shewn to warrant the court in disturbing the verdict of the jury. If the jury had found otherwise we should have felt bound to set aside the verdict, unless we rashly undertook to overrule a series of decisions approved of by the highest authorities.

Mr. Kent, Q. C. and *Mr. G. H. Emerson, Q. C.*, for plaintiff.

Sir J. S. Winter, Q. C., and *Mr. Greene, Q. C.*, for defendants.

1893, *July*. HON. SIR F. B. T. CARTER, C. J.

Contract—Lease—Infirmary of Lessor—Inadequacy of consideration—Fiduciary relationship.

Where the plaintiff, who was an aged and illiterate person, entered into an agreement with his son for a lease of a certain property ; it appeared that the lease was drawn up by the plaintiff's solicitor, taking his instructions from the plaintiff's son. The plaintiff afterwards repudiated the lease, and claimed he had never signed it. The value of the rental of the premises was \$200 per year, the amount set out in the lease was \$80 per year. It appeared also that just before the defendant took possession the plaintiff had expended \$1,200 on repairs to the premises. The witness to the lease was not in the country, and the solicitor who drew it was dead. The defendant had been in possession and had paid rent for four years at the rental in the lease, before the rental of \$200 was claimed. In an action for the rental of \$200 per year, which the plaintiff claimed was the sum at which the premises had been leased—

Held—The evidence disclosed gross inadequacy and there was no evidence to dispel the inference of the law against the unfairness of the alleged contract, especially as there was a fiduciary relationship between the parties. In family matters there should be on all sides *uberrima fides*, or the most entire confidence. Lease cancelled and set aside.

THIS is an action for the recovery of rent of premises on Water Street, at the rate of \$200 a year, payable half-yearly on the 2nd days of July and January, which, computed to the 2nd July, 1893, amounts to \$1,500, of which the defendants have paid \$560, which they contend is all for which they are liable up to the 2nd January last, being at the rate of \$80 a year.

No question has been raised as to the beneficial occupation of the premises, but the defendants allege in defence that under a lease made between them and the plaintiff, of date the 2nd January, 1886, they have covenanted to pay a rent of \$80 a year only for the same premises, which the plaintiff denies is his deed, that it was obtained by the fraud of the defendants, and that it contains a false statement respecting labor and repairs, and claims the cancelling of the same and other relief.

The parties bear the relation of father and sons. There has been delay in determining this action, which was commenced by the late Mr. R. McNeily in July 1890, occasioned partly by his death, but chiefly to obtain the evidence, if feasible, of the only subscribing witness to the lease, one Bernard Nicker-son, a lad who was at the time in the office of Mr. McNeily, who had left for some part of the United States or Canada, but whose place of residence, after enquiring, could not be dis-

covered; and also, I was desirous that parties so nearly related would have amicably arranged between themselves.

The evidence of all the parties was taken before me and the whole matter left to my adjudication; and, as no arrangement has been made, I cannot longer delay giving my decision for which the plaintiff is pressing.

The plaintiff denies all knowledge of having executed the lease, and that, when at first the defendant (Thomas) enquired about the amount of rent, if the premises were leased to him, he, the plaintiff, said £50, or \$200, a year, which Thos. agreed to pay, but asked to grant him grace as he had not then the means; it was worth more than £60, although then in bad state of repair; there were two tenements, he was receiving for one \$100 a year, and for the other \$80 a year; that shortly afterwards he expended some \$1,200 in repairs (1885 and 1886), the superintendence of which was with Thomas; he paid ground rent (\$68 a year), besides municipal taxes, also a mortgage of \$160, and \$40 to Mr. Prowse for extension of lease; demanded the \$200 a year himself frequently, and through Mr. McNeily, but defendant refused to pay; afterwards the three of them went to Mr. McNeily's office to see about the rent, when plaintiff said he would not take a penny less than the \$200; Thos. then produced a document from his coat pocket, saying it was a lease of the house; he (plaintiff) never heard about it before; never signed a lease; was in a grocery business with Thomas, which was settled up all but the rent, which was afterwards paid at \$80 a year for three years without prejudice to plaintiff's claim for the residue. The lease produced is a printed form, the blank spaces are in the hand writing of the late Mr. McNeily, dated 2nd January, 1886, for a term of twenty-five years from thence, rent £20, or \$80, payable half-yearly (2nd July and 2nd January), together with all the taxes and impositions then or thereafter to be taxed or imposed; in the description are the words "and now fitted up and prepared for a place of business by the labor and at the expense of the lessees," and in the covenant for repairs by the lessees, the words "both external and internal" are expunged, and the word "internal" inserted before "paintings, cleanings, reparations," &c.; the initials B. N. in the margin opposite. Both defendants, who were examined apart, gave evidence of the execution by the plaintiff in Mr. McNeily's office, whither all of them had gone together. Thomas states the lease was prepared in July, 1886, but dated January. Thomas called twice at the office the same

day, and the three executed it in Mr. McNeily's presence; the boy Nickerson did not sign in his (Thomas) presence; Joseph says he did do so after he had signed; can't say rightly that Nickerson signed; it was executed in the inner office, where he got it next day; Nickerson's name was to it; paid Mr. McNeily \$5 for it; only one paper signed; did not see plaintiff pay or get a paper. Joseph says there was no money paid in his presence; plaintiff told him in July, 1886, and several times after, he would give the premises at £20 a year; Thomas not then present; the latter states he did not know what rent was to be paid until they went to have the lease prepared. Joseph states he did not know in July, 1886, he and Thomas were going into business; had been in the employment of his brother John until the January previous. On cross-examination—that he remained with John six months after lease executed. Both state the repairs were not made at their expense; and Thomas says that it is not true. They said Mr. McNeily put that in when he filled up the lease. Joseph says the partnership between them commenced in 1887, and has not spoken to his brother about going into business nor with his father, the plaintiff, about giving the lease. It was in Springdale Street, in his house, plaintiff first mentioned the £20 a year; Thomas was there then; he would not swear the house was worth £50 a year; in July, 1886, St. John and Moren were occupying the tenements.

It will be observed there is material discrepancy in the evidence of the defendants, and except from that of the parties themselves I am not informed, and it is most important to have known, the circumstances immediately in connection with the execution. It is difficult to imagine, in the absence of any satisfactory independent testimony, the plaintiff would have willingly executed a document demising his full term and interest in leasehold premises for so inadequate a return, having regard to the amount of ground rent and liabilities to his landlord, besides the heavy expenditure for repairs, and the statement respecting them as if joining an element for the consideration for the granting, so admittedly contrary to the truth, is of itself sufficient to awaken suspicion, so much so as to require clear and unimpeachable evidence in support, which certainly has not been furnished.

Inadequacy in the consideration does not of itself constitute a ground of equity to revoke a bargain, as there may be circumstances fairly to account for the lowness of the price, but

where the inadequacy is so gross as I consider it to be in this case, there should be evidence to dispel the inference of the law against the unfairness of the alleged contract, especially where there is a fiduciary relation between the parties.

In family arrangements it is recognized there should be on all sides *uberrima fides*, or the most entire confidence, and, per Lord Chancellor Woodbury, there is an equity which may be founded on gross inadequacy or consideration, which involves the conclusion, that the complainant either did not understand what he was about or was the victim of some imposition.—*Tennent v. Tennent*, L. R. 2 vol. H. L., *Scotch Appeals*, p. 6. In a recent case, July 13th, 1892, 8 vol. *Times*, L. R. 698, a contract was set aside where the defendant, who could neither read nor write, but who could sign his name, signed an agreement which was not read over nor explained to him. The plaintiff here is aged and infirm, not over literate, but I should say shrewd in his time of life. From the evidence, by comparison with his genuine signature and its peculiar character, I am inclined to the belief the handwriting to the document in question is his, although he may have forgotten the circumstances. The only subscribing witness was the lad Nickerson, and it is not satisfactorily explained who gave the instructions for the preparation to Mr. McNeily, but it is strange his name does not appear as a witness, although the writing within the spaces is his, and after search in his account books no entry can be found in anyway relating to this document. The absence of a counterpart is also an incident for consideration.

After a careful review of the evidence and reference to the principles recognized by the Courts in transactions of this character, I have come to the conclusion that I am bound to order the giving up, setting aside, and cancelling of this alleged lease, but in regard to the relation of the parties and that the plaintiff had demanded a rental of \$200 a year from the first, having throughout repudiated the execution by him of the alleged lease, I think, under the arrangement of counsel that I should finally settle this disputation, the plaintiff should execute a lease to the defendants if they are willing to accept, at \$200 a year, payable half yearly as before, being at least the value at the time when possession taken, for the term mentioned in that now set aside, with usual and proper covenants, and in the event of disagreement upon those, a reference to the master to settle, for completion of which I allow until the first of Sept. next. I give judgment for the plaintiff in the sum of \$940,

which includes the rent to 1st July instant (1893), but under the circumstances, without costs, to the present time.

Mr. Horwood for plaintiff.

Hon. E. P. Morris for defendant.

MCPHERSON v. GUARDIAN INSURANCE CO., ET AL.

1893, October. HON. MR. JUSTICE LITTLE.

Insurance—Fire—Conditions to furnish proof of loss—To use care for preservation of property—Damage—Wrongful acts of third parties—Civil commotion and riot, loss occasioned by.

Policies of insurance were effected on goods, portion of plaintiff's stock in trade, destroyed by fire on July 8th, 1892. The defendant companies declined paying on the grounds that the assured had not complied with the conditions in his policies: (1). To furnish proof of loss within fourteen days; (2). To use proper means to preserve property insured; and further that no loss was sustained under policies. It appeared that when the destruction of the property was imminent, large numbers of persons entered the premises of plaintiff and carried away portions of the goods insured, and also destroyed quantities of the same. It also appeared that about one-fourth of the property on the premises was uninsured. In an action for the insurance the jury found for the plaintiff. Upon a motion on behalf of the defendants to set aside the verdict, it was contended, (a). That the company was only liable for such loss as was the direct result of the fire, and not for property stolen, abstracted or damaged; (b). That there had not been due care by plaintiff to protect property from depredations; (c). That there was an abandonment of the property by the plaintiff before the fire reached it which was not justifiable; (d). That the fire was not the proximate cause of the loss; (e). That the fire was caused by a civil commotion and riot, and was an exemption from liability under a clause of the policy.

Held—Any loss resulting from an effort to put out a fire, whether by spoiling goods or otherwise, directly or indirectly, is within the policy; breakage by removal, damage by water, loss or theft, occasioned by exposure, are within the loss covered by the policy.

Held—From the evidence, the assured had done all that a prudent man could do to save his property, and that there was not a mere remote apprehension of danger, but an immediate danger; that the property was only abandoned after all hope to save it had been given up.

Held—That there was no evidence to support the contention that the assured had not complied with the condition of the policy to furnish the defendants with a statement of the particulars of his loss.

Held—There was no evidence to support the plea that the loss by plunder was occasioned by a civil commotion or riot during the happening of the fire.—Verdict of the jury sustained.

In these actions the plaintiff sought to recover from the defendant companies certain amounts claimed under three policies of fire insurance effected by him with them, respectively, upon goods and merchandize then forming part of his stock in trade, and alleged to have been subsequently lost by fire on the 8th of July, 1892

The first action, that against the Guardian Assurance Company, was tried in December term before Mr. Justice Little and a special jury.

The actions against the General and the Northern Insurance companies were consolidated and tried in the same term before the same judge and a special jury.

In the case against the Guardian Insurance Company we find by the pleadings on record that the plaintiff's statement of claim was for loss under a policy of fire insurance, No. 2,276,915, issued by the said company, and of date the 3rd of September, 1891. upon stock in trade of the plaintiff for \$4,800. Plaintiff claimed this sum of \$4,800, and also the sum of \$120 interest thereon.

The defendant company met the claim under these three following pleas, viz.: (1). That the insurance under the said policy was subject to the condition that the assured should, within *fourteen* days after the said loss or damage had occurred, deliver to the defendants as particular an account of his loss as the nature of the case would admit of, and produce such other evidence as the directors of the company or their agent might reasonably require, and that until such account and evidence were produced the amount of said loss or any part thereof should not be payable or recoverable; and averred that the plaintiff did not furnish an account as required by the said condition within the said period, and did not produce other evidence relating to the said loss and damage which was reasonably required by the defendant company's agent; (2). That the plaintiff did not sustain loss by fire under said policy; (3). The defendant company, as an alternative defence, paid into court the sum of \$833.33, alleging that that sum was enough to satisfy the plaintiff's claim.

By leave of the court, at the trial, defendant further pleaded that plaintiff did not use due and proper care and diligence, or use proper and sufficient means for the protection and preservation of the property insured; that the fire which occasioned the loss, the subject matter of the action, was such a fire as is included in the exemptions of the tenth clause of the condi-

tions of the policy, being a fire caused by civil commotion or riot. The plaintiff joined issue on every part of this defence.

It is not necessary to set out just here the details of the circumstances connected with this claim in evidence during the trial. At present it is sufficient to state that the stock in trade of the plaintiff consisted of dry goods, millinery, haberdashery, etc., contained in his shop and premises at the time of effecting the policy, situate on Water Street, in St. John's.

That the great fire of the 8th of July, 1892, which had destroyed a portion of the city of St. John's, extended itself to the immediate vicinity of these premises. During the general conflagration it was found that fire existed and was making headway in parts of the interior of plaintiff's premises, but by the application of a supply of water and other means it was got under and extinguished.

It also appeared that the destruction of the premises and their contents by the fire then devastating that portion of the city was regarded as imminent, and in the confusion and under the circumstances, after all hope of saving the property had been given up by the plaintiff and others, the premises were entered by numbers of people and large quantities of the goods of the stock in trade therein were carried away and had not been restored or accounted for to the plaintiff or to the agent of the defendant company.

From the fire which prevailed in the interior of the structure, and from the effects of the application of the water and the efforts of parties in extinguishing it, as well, apparently, from the numbers of parties passing to and fro upon the premises, it was found that large quantities of the goods had been damaged, thrown upon the floors, trampled upon, and rendered utterly valueless.

It further appeared from the evidence that the value of the entire stock in trade, the property of the plaintiff, upon the premises at the time of the fire, and upon which these insurances existed, was estimated at \$40,571; the amount of the insurance under the policies being \$28,700. This would leave the plaintiff uninsured or make him his own insurer, to the extent of \$11,271.

Upon the examination of the witnesses (fourteen in number) being concluded, and after counsel had addressed the jury, the learned judge submitted the case to their consideration.

After some explanatory observations on the nature of the contract entered into under such policies, and the requirements

and conditions called for on the part of the assured, reference was made to the pleadings in their order, and to the evidence relevant and applicable to the issues upon which they were to decide.

That the execution of the policies put in evidence was admitted by the companies and at the time of the loss claimed for were outstanding and still in operation.

They were to satisfy their minds and determine from the evidence whether there were goods, merchandise and effects of the character described as composing the stock in trade of the plaintiff in the stores and upon the premises at the time of the alleged loss on the evening of the 8th of July, 1892.

As to the subsequent neglect to furnish, in due time, the defendant company with a sufficient statement of such loss, they were directed that such a condition was in substance most reasonable, that the assured should, within a convenient time after the loss, produce to the company something which would enable them to form a judgment as to whether or no he had sustained a loss, and its extent. The statement or evidence of such loss should be of such a character as to satisfy the directors of the company, as reasonable men, of the particulars of such loss, and after fair proof being so furnished, the directors or company would not be warranted in obstinately withholding redress.

The jury were to consider and determine the evidence and circumstances whether the assured had or had not acted properly and supplied as full and sufficient a statement as the circumstances and conditions, and within the time called for by the terms of his policy, and furnished as full and sufficient a statement of his stock in trade and his losses as the means of information then available enabled him to supply within the time so limited. The account, such as was given in evidence, together with vouchers, &c., accompanied with a statutory declaration, were duly furnished to the company, and no hesitation or perverse holding back of any such information would appear to have occurred on the part of the accused in complying with the conditions of his policy. Under such circumstances they should determine whether or no these conditions to account and verify were substantially complied with.

The proof of loss was, of course, upon the assured, he was to satisfy the jury by the evidence given in support of his claim that the goods were on the premises on the occasion of the fire, and lost, damaged or stolen at the time thereof.

The payment of \$833.33 into court on each of the cases in which actions were pending was considered by the companies as sufficient to meet the amount of loss suffered by the assured from the effects of the fire and in discharge of their obligation to indemnify the assured under their respective policies.

That, as to the charge made of the absence of due and proper care and diligence on the part of the assured in and about the protection and preservation of the goods and effects on the occasion of the loss and damage complained of, the jury were informed that it was the clear and recognized duty of the assured to exert himself and to use every reasonable effort under such circumstances to save his goods. He should not merely look on at the work of destruction, but was bound to use his best exertions in endeavoring to save them, otherwise his loss might be greatly attributed to his own conduct and the consequences of his own act, and for which he could not hold the company liable. Under the evidence, therefore, it was for them to consider and determine whether he did or did not, through his own exertions and those of his servants and agents, use every reasonable effort to save and protect the goods now claimed to be lost on his premises and stolen therefrom at the time of the occurrence and continuance of the fire so particularized and described by the several parties by whose testimony they were to be guided in the conclusion to be arrived at by them?

The judge then particularly observed on the claim of the defendant company for exemption from liability under the provisions of the contract by reason of the goods being, as they alleged, lost and damaged through the misconduct of parties who entered the premises on the occasion referred to and removed the goods and other articles from the shelves, threw them about, trampled upon them, and stole or plundered or carried away a great quantity of them.

He instructed the jury that the words "loss or damage, occasioned by fire," used in these policies of assurance were to be construed as ordinary people would construe them, and meant loss or damage by ignition of the effects, or by ignition of a part of the premises where the effects or articles were, and any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles such as furniture out of a window, etc. In a word, every loss that clearly and proximately resulted, whether directly or indirectly, from the fire would be a loss

within the terms of the policy, and for which the assured would be entitled to be indemnified; and if they found that any portion of this property had been removed from these premises and stolen or carried away by parties during the fire and became lost to the plaintiff or to the defendant company, then they might come to the conclusion that this was a loss for which the defendant company would be liable.

It was remarked in his concluding observations to the jury that under the evidence and from the circumstances connected with the events attending the submission of the cause to this inquiry, no charge of fraud had been advanced nor had there been any testimony tendered or given during the trial in any way impugning the character of the plaintiff in these proceedings.

They were then informed that if, under the circumstances and the directions accompanying and applied to the evidentiary facts, they found in favour of the plaintiff, their verdict would be for the amount so found, less the value of the goods saved and restored to the plaintiff as particularized in evidence, and also less the amount of interest claimed by the plaintiff. But in addition to such general finding they should, if enabled from the evidence, answer in writing the following questions for the use and information of the court thereafter, in finally disposing of the question raised on pleadings and reserved for hearing before the full court as to the liability of the defendant company for the goods alleged to have been so fraudulently taken and carried away.

These questions were then read and explained to the jury, and are as follows:—

(1). Was the fire which damaged the plaintiff's goods occasioned by accident?

(2). Did the plaintiff and his servants on the occasion of the fire exert themselves in a reasonable and proper manner in the protection and preservation of the said goods?

(3). What amount of loss or damage was occasioned to the plaintiff by the direct action of the fire, or by the means applied to extinguish it, or from trampling, breaking, etc.?

(4). Were there any of these goods taken, stolen or abstracted from the establishment of the plaintiff on the night in question and during the continuance of the fire? If so, what would be the approximate value of such goods?

(5). What was the value of the goods taken and carried away at the instance and by the orders of the plaintiff?

(6). Were these latter all returned to the establishment, and were they subsequently included in the valuation made by Messrs. Wright and Curran?

(7). What may have been the value of the goods represented by the debris found upon and about the floors of the different departments after the fire?

In the estimate of goods destroyed and lost by plaintiff on the occasion they were desired to distinguish between, first, the goods destroyed by direct consequences of the fire, such as by water, handling, trampling, etc.; second, and goods abstracted and carried away by outside persons; and that the jury were so approximate the loss under each head as nearly as practicable.

The jury thereupon found generally and returned a verdict in favour of the plaintiff for the full amount claimed by him, with interest, less the amount of the estimated value of goods saved and restored to the plaintiff; and to the written questions their answers were set out in writing as follows: to the first question they stated that "We consider the fire was caused by sparks from the opposite side of the street"; to the second question they answered that "According to the evidence we find the plaintiff and assistants remained on the premises as long as it was practicable and did all in their power to save goods"; to the third question they answered "The jury have no means of estimating"; to the fourth question they state "According to the evidence we believe there was a quantity of goods taken, but as to the value of said goods we can give no estimate"; to the fifth they state "It is impossible to arrive at a value, not having an estimate of the goods returned from Duder's store"; to the sixth question they answer "We do not consider we are in a position to answer this"; to the seventh they answered "According to the sheets marked H. on exhibit in evidence, we estimate the total loss from the premises at \$37,700.66."

The same results followed on the trial which subsequently took place in the consolidated case of the said plaintiff against the General and Northern Assurance companies for the amounts claimed under the policies effected by plaintiff with them, respectively, upon the same stock in trade. In the latter case an eighth question was sent to the jury, viz.: In the estimate of goods destroyed and lost by the plaintiff on the occasion of the fire, distinguish between (1st), goods destroyed by the direct consequence of fire, such as by water, trampling, handling, &c.;

(2nd), goods abstracted and carried away by outside persons, and approximate the loss under each head as nearly as practicable. To which they answered that they could not give any approximate value of goods so stolen or destroyed.

At a subsequent sitting of the court the formal hearing of the argument took place upon the motion reserved to defendant at the trial for setting aside the verdict entered for the plaintiff, and the granting of a new trial on the "grounds of "misdirection in that the jury ought to have been directed that "the plaintiff was entitled to recover only for such loss and "damage as was the direct result of the action of the fire or of "the means used to extinguish it, or of trampling, breaking, &c., " &c., in the endeavour to save the property from total destruction by fire and not for the loss of the property taken, stolen "or abstracted from the premises, or for damage caused by "trampling, handling, &c., in taking away, abstracting or stealing, or endeavouring to take away, steal or abstract the property; and 2nd, that the findings or answers of the jury upon "the questions put to them do not amount to a verdict for the "plaintiff, or any verdict."

At the argument upon this motion it was admitted that the three companies relied upon the same grounds of objection to the claims of the plaintiff, except that under the policy of the Northern Assurance Company there is an express exemption from liability for goods lost by theft or stealing during the fire.

The contention of defendant's counsel was then confined to two points, viz., that the loss was not occasioned or sustained by fire, that the company was not liable for goods that may have been stolen and carried away, and that this wrongful removal and stealing of the goods had occurred before the fire had touched the premises of the plaintiff, and when it reached there there was no part of the stock of any great value left in any of the trade apartments of the premises; that there had not been due care or reasonable effort made by the plaintiff and his servants to protect the property from such depredations. The loss, consequently, was not the natural result of the fire, nor could it be held to be a "loss by fire" within the meaning of the words of the policy. That from the evidence it was apparent that looting and plundering had preceded the occurrence of fire in these and other business premises on the occasion in question. It was not such a taking and carrying away of goods or ordinary theft resulting from and incident to the fire, but deliberate and preconcerted plundering carried on

before the safety of the property was at all endangered. The felonious conduct of outsiders was the occasion of the loss.—The imminence of the danger of loss should not affect the liability of the company, and did not justify an abandonment of the premises and goods by the plaintiff. The presence of surrounding fires could not be regarded as justifying such an abandonment as plaintiff was guilty of here. This led to the plunder, and the fire could not be at all regarded as the proximate cause of the loss to which plaintiff was subjected. Counsel further contended that it did not appear that any such stealing occurred in saving the goods or the removal of them to places of safety on account of the owner or the insurers. Learned counsel also made reference to the analogy stated to exist between Marine policies and these policies of Fire Insurance. In this case, on the part of the defendants, it was still further contended that there was no physical connection between the fire that was found to exist on the premises and the loss of the goods in question and there was no justifiable cause of alarm or danger, and the effect was too remote from any cause then existing to warrant the assumption that these goods were destroyed by fire or that fire was the proximate cause of their loss.

The following authorities were cited by counsel in support of the position and acquirements advanced on the part of the defendant companies—*Keath v. Gilbank*, 9, Q. B. D., 308; *Scholen v. N. Lon. R. Co*, L. T. 21, p. 835; *Howard Fire Insurance Co. v. North Insurance Co.*, U. S. Sup. Court, 2, Wall, 194; "*Ionides*," 10 Jur. N. S.; *White v. Rept. Insurance Co.*, 5 Maine Reports, p. 91; *Hillyer v. Allegany Insurance Co.*, 3 Barr. (Pa.) 470, &c.

The argument of plaintiff's counsel in support of the verdict was confined to a review of the evidence and the circumstances as detailed and recounted by the witnesses in the course of their examinations. That the loss was the direct and ordinary result of the fire then prevailing, and the condition of the premises and their environment at the time justified their enforced abandonment by the plaintiff and his servants. Counsel also called cases in support of the plaintiff's position, and particularly the case of *McGibbon v. The Queen Insurance Co.*, and that of *Harris v. the London and Lancashire Insurance Co.*, both reported in 10 Lower Canada Reports, &c.

After this rather extended outline of the history of the proceedings and incidents connected with the trials had upon these claims, we shall now set out substantially the evidentiary facts

and circumstances upon which the findings of the jury apparently rest, and give the grounds and reasons, both in fact and in law, which induce us to sustain the verdicts so rendered.

It appeared that the plaintiff has for many years been carrying on the business of a shop-keeper in the establishment and upon the premises now occupied by him, and situate on the south side of Water street, in St. John's East.

That for a number of years he effected insurance with one or other of the defendant companies on his stock in trade, and during the year 1891 he obtained three policies from these companies, the first of these was in the Guardian Assurance Company, and in the recital part of that policy, the sum assured was stated at \$4,800, and the premium was \$24; for insuring from loss or damage by fire, "the property of the plaintiff, consisting of dry goods, haberdashery, &c., contained in the shop, wareroom, brick built and slated, and in the back wareroom adjoining, and store underneath, situate, &c." In the operative part it stipulates to make good to the assured "all such loss or damage as shall happen by fire to the property mentioned," and was to continue in force for one year.

The Northern Assurance Company issued two policies to the plaintiff upon his stock in trade described in the body of the policies. The sums assured under these are declared to be \$4,800 in policy No. 1,613,325, and the sum of \$7,200 in policy No. 1,660,853; they were to be in force for a period of twelve months from their date, the 16th September, 1891.

The General Life and Fire Assurance Co. issued their policies No. 349,539, to the plaintiff on the 29th September, 1891. The amount for which it was effected was \$4,800, and also policy No. 349,225 for \$7,200, to remain in force for one year, against loss or damage by fire, to the goods, general merchandise described therein, being the property of the plaintiff and then being in his possession and on his said premises.

The value of the stock in trade thus protected is already stated at \$40,571, and the total amount of these insurances is \$28,700.

This sufficiently shows the position these parties stood in towards each other up to the happening of the fire, on the 8th day of July, 1892, when it is stated the liabilities of the companies, under these policies, attached by reason of the loss and damage, at that time, of the goods and merchandise so insured.

The facts with which we now have to deal in relation to these claims, arose out of that calamitous fire which occurred

on the evening of that day, and in the course of a few hours destroyed and laid waste almost the entire eastern portion of our city.

The plaintiff's premises, containing the goods in question, as already stated, are situated on the south side of Water street, and consist of a shop, store rooms in different flats or stories, a millinery department and room extending out over a vacant space in the rear, and underneath the shop there is an extensive cellar used as a store. There was only one entrance from Water street protected by an iron grating or gate, and in the vestibule were the ordinary shop doors with windows. On each side of the entrance there were two spacious windows of plate glass. From the shop, communication was had to the upper apartments by a stairway, and to the rear from the shop there was a broad stairs leading to the yard from which, through a doorway, you passed into the underground or cellar storeroom.

To the east of these premises, adjoining and connected with them, were the grocery and dry goods' stores of Bowring Bros.; and on the west, and adjoining the plaintiff's, were the grocery and spirit stores of J. D. Ryan. The rear of the premises abutted on buildings of brick and stone and structures of wood, used for storage and other trade purposes. From the passage way or yard, as it is termed, there was a gate opening into what is called O'Dwyer's cove, which serves as a street leading to the waters of the harbor and a firebreak at this point in Water street.

On reference to the evidence of the plaintiff himself, it appears that on the evening in question he had necessarily visited his country residence, which lies about two miles to the westward of the city. He had left his shop and premises rather late in the afternoon to guard his dwelling-house and other property at his country place from the risks and dangers to which they were exposed from the forest fires then extending in that direction of the country, and in the immediate vicinity of his residence. Whilst he was engaged in protecting his country property, his attention, for the first time, was attracted to the existence of the fire in the city, and thereupon he and his wife drove into town and got down to the Water street premises at about half-past eight o'clock that evening. The fire at that time was advancing from the eastward and up Water street towards his place. When he got into the street there was in all directions utter confusion, and people greatly excited in the endeavour to save their premises and goods.

At his own place he found things were pretty much as when he had left for the country. He used no shutters to protect his windows, he had instead an iron railing which is placed and fastened across the windows and extending upwards from the sills over five feet. The windows, as stated, were of plate glass in wooden frames. Over the doors were also plate glass windows. The iron railing at the outer doorway was also about five feet high from the threshold. This gate or rail was closed and locked when he arrived; he unlocked it and passed into the shop with his wife and three of his clerks. There then was no apparent danger, but in about half an hour the fire was found to be rapidly approaching them, both from the eastward and from Duckworth street above, and to the northward of them. It was breaking its way down through Beck's cove fire-break towards O'Dwyer's cove, and levelling and destroying every structure in its course. The plaintiff then became anxious for the safety of his own premises, and with the assistance of his clerks and others, engaged immediately in saving the goods from the shop. He had his own carriage loaded and sent off to the country. His man returned with his cart and horse and was again despatched with another load. He endeavoured to obtain other parties to assist with their horses and cars, but they were engaged in protecting their own property and could not assist him. A Mr Campbell, however, carried away one load with his horse and cart. Some of his neighbors, who had just shortly before removed their goods to his shop for safety, now carried them away from the danger to which they were then exposed. He succeeded in a short time in sending off three or four cart loads of the goods to his country place, and to the stores of Edwin Duder, in the western end of the city. People rendered their assistance in removing the goods into these carts, and the last was loaded by the back entrance at the rear of the premises, because of the impossibility of getting the horses to stand at the shop front, from the heat and fire in the street. The wind was blowing a gale from the north-west, and at this time the houses on the opposite side of the street and at Smyth's corner were on fire, the flames extending right across the street. This, with the rushing of people to and fro, prevented, in that quarter, the transport or removal of any more goods to the carts. The wind carried the heat, flames and sparks directly across the street to these premises; the width of the street was about sixty feet. During the whole of this time the plaintiff remained at the front of his shop

in the vestibule, between the iron grating and the inner glass door. The back or rear entrance had been closed. No one had obtained entrance to the establishment but the employees. Two policemen and a number of people were outside the sidewalk near the iron grating. The fire had now reached Bowring's, immediately to the eastward of plaintiff's, and the flames were extending towards his place. His clerks removed some goods from the shop counters, the passage at the rear, and also took some chests of tea from the cellar and loaded the last cart with them. No fire had up to this appeared in the shop or premises; but large quantities of smoke were coming in from the rear. Whilst at the door, during the removal of the goods, one of the police warned him that there was danger from an explosion on Bowring's adjoining premises, where a quantity of gun powder was said to be stored. This was just as the last load was despatched, and hearing this warning, he left the premises. The smoke was now filling the whole place, and plaintiff, in making his way through the shop, heard the breaking of the plate glass window in front, and believing it to be the threatened explosion, he ran down the stairway and got out into the yard, where he found numbers of parties pressing in from the cove. When in the yard it was found that, from the body of smoke in the cellars, it was impossible to remove from it any more of the goods; and, as the fire was coming round by the eastern end of Bowring's stores, the clerks were obliged to leave; and shortly after the fire communicated with the grocery store adjoining plaintiff's place.—The plaintiff then passed out through the gate-way into the cove, and crossed over to Rankin's corner on the opposite side of the street; and finding from a view of his premises, he could not discover any blaze or the presence of fire, he ventured back and made an effort to re-enter them by the rear from the cove, but found he could not get up the stairs from the density of the smoke all around the place. It was too dense to permit of his getting into the premises. The heat also was so intense on the front as to prevent his attempting to get access by that way to the shop. What are called flankers, large sparks and volumes of smoke were coming down and around in all directions. Entrance could not be effected at this time, and it appeared to be merely a question of a few moments when the whole place would be consumed. He recrossed the street to Rankin's, about one hundred and fifty feet from his shop, and was there joined by Mr. McNeily, Q. C.,

Mr. Chapman, Bowring's head shopman, Mr. Duder, and others. The smoke was then issuing from all the windows of his premises, and shortly the shop and building were so enveloped in smoke as to be perfectly shut out from view. He and those with him were hopeless of the place and regarded all as lost. So certain was he of the destruction of his premises that he determined then and there to secure some place of business where he could utilize the small part of his stock in trade he had saved, and provide room for goods he had some short time before ordered and was then expecting to arrive from Liverpool. He consequently left the scene of the fire in search of this accommodation, but failed to find any available place. He had, as he deposed, exerted himself to the utmost in the preservation of his property and had remained by his premises as long as he had any hope of saving them, or of their escaping the conflagration. About daylight on the following morning he left town with his wife for his home. He returned to his premises at nine o'clock in the morning and found the front windows of his shop gone, half of the floor of the shop burnt, all the inside of the windows burnt, the sashes and glass broken, the counters and some fixtures near the eastern window partially burnt, the shop, ware-rooms, &c, were ankle deep with goods trampled upon, saturated with water, and rendered valueless. There was water in the shop and cellar, and goods scattered over the floors and trampled into masses of debris. The glass remaining in the front windows was discoloured and the fan-light over the street door was cracked in pieces. It was three-eighth inch glass, and was broken by excessive heat. In the cellar the posts, pillars, heavy uprights and the beams were charred, and the water and gas pipes were melted away.

The plaintiff kept his reserve of heavy goods in the cellar, and on visiting it he also found the floor littered with the debris or the remains of a portion of the goods that had been stored there. Early on Saturday, the 9th of July, he called on the agent of the Guardian Assurance Company, and also upon those of the other two companies, and notified them of his loss, and requested them to attend at the premises to view the results of the fire there. They did not do so until the following Thursday, and then went over and inspected the whole premises but gave no intimation of any intention to oppose the claim or adopt any such contentious course as the present against its settlement. They were already aware of and were then informed of what had been the conduct of some people

along the line of the fire on the street, and that after the plaintiff was obliged to abandon the place and had left his shop door, a large quantity of goods, as he believed and was informed, had been carried away. The neighboring stores and houses had been subjected to like treatment by numbers of people who, notwithstanding the risks they ran, entered the establishments, secured goods, furniture, or whatever effects they could lay hands on, and removed them from, what they believed to be, impending and certain destruction. None of these were returned to the plaintiff, and he informed the agents fully of all these facts at the time of their visit of inspection. The agent for the Guardian stated at that time that he had not had very much to do with insurances and would act in accordance with the Northern Company in the settlement of this matter. All the remains, consisting of goods saved on the premises and such as had been carted away and returned, were now inspected and valued by two arbitrators, the appointees of the companies and the plaintiff, respectively. Their reported estimate or valuation was in evidence and is contained in exhibit marked and amounts to the sum of \$2,362.

After this view of the premises and the valuation of the remains of the stock had been made, these goods that had been rendered valueless by the water applied in extinguishing the fire in the shop, and by being handled, thrown about the floors and trampled on by those who had been on the premises after plaintiff's abandonment of them, were carted away in seven horse-cart loads. The place was repaired and restored to a condition suitable, under the circumstances, for the carrying on of business. It appeared that he then applied at the companies' offices for some of the customary forms to enable him to make a statement of claim, but was informed all these had been destroyed in the fire. He thereupon furnished the agents with a rough statement of his loss. They did not refuse him a settlement, but stated they preferred to allow the matter to stand over for a short time until the arrival of their adjustors from England and the United States. On their arrival he furnished the agents, as desired, with a further statement of his loss, together with the particulars of his stock in trade, as set out in his evidence and in exhibit F. forming part of the record in these cases. The adjustors and agents expressed themselves satisfied with the statement, and Mr. Babb, agent for the Northern, observed that the fifteen per cent. allowed as profit on the sales or market value of the goods was rather low and

ought instead thereof to be placed at twenty per cent. When the agents and adjustors visited plaintiff's premises he had entirely restored them to their former condition, and was carrying on his business as theretofore. They expressed themselves satisfied with their inspection, and intimated that in their opinion, from what they saw and had reliably reported to them, it was apparent there had been sufficient fire with its consequences on the premises to account for such a loss. They then made no demand for further statements. They had been furnished with exhibit E., as well as with all plaintiff's books of account, having had the latter for some days in their possession, and stock sheet for the past and current year, with bills of parcels, together with a statutory declaration of the correctness of the claim. The statement and books showed what amount of stock was on hand at the end of the year, and the particulars of stock received, and such as was disposed of in trade from that time up to the occurrence of the fire. After this delays occurred in efforts to have a settlement made, and communications were interchanged between the plaintiff, his solicitor and the agents of the defendant companies. The letters are in evidence and are contained in exhibit G. The plaintiff deposed that on reference to that correspondence it would appear that he was required to furnish the particulars and detailed account of the goods that had been lost, that is, that were destroyed in or upon the premises and carried away or stolen therefrom during the continuance of the fire. By letter of the 5th of August, 1892, and others following, addressed to the solicitors of the companies, it will be seen that he had supplied all available information to them, and subsequently furnished a list in detail of goods he and his employees remembered being stored in the cellar.

It appeared that conferences had taken place between the parties and their solicitors, and that in pursuance of the terms of one of the conditions of their policies, they had agreed to a reference of the questions in difference, or as the ascertainment of the loss, by arbitration. But, from plaintiff's evidence and the purport of the correspondence put in by him, it would appear that the defendant companies declined to proceed with the references agreed on, unless they were previously furnished with certain particulars which plaintiff found it beyond his power or ability under the circumstances to supply them with. He states he was consequently forced into the institution of these actions.

This appears to be the substance of plaintiff's own testimony. The details of the incidents relating to the fires found on the premises are given by witnesses who had assisted and were the means of extinguishing them.

These fires showed themselves after the premises had been abandoned by the plaintiff and his people at the time deposed to by them. Some of these witnesses, Mr. McNeily, Q.C., for instance, deposed that when the plaintiff joined those who were standing at Rankin's corner on the night of the fire, McPherson's place appeared to be hopelessly gone and given over to the flames. * * The heat was so intense in front that the shutters on some of the adjoining windows were blistered and it was dangerous to pass along by that side of the street. He saw people entering the shops to plunder at the risk of their lives. He saw the plaintiff and his wife and told them the case was hopeless and advised them to go home. He was there from the time of the burning of his own house up to half-past one o'clock, when the plaintiff left the street. The witness thought of there being powder and cartridges stored in Bowring's, and because of that he considered there was danger. Parties were carrying off goods taken and appropriated by them from the stores all around. They were conventionally orderly, but technically they were not so. He states he saw this appropriation of property going on on a large scale, and it was due to the fact that it was either to be taken or left to be burnt. It was considered to be hopeless. It was, under the circumstances, impossible to prevent the carrying off of goods from these buildings on this occasion. He saw McPherson's place dismantled, the windows had no shutters to them, were broken in, and people were going in by the shop door and carrying away small lots of goods. At Ryan's there was a sufficient force, apparently, to keep the people out, the shutters were up, and Bryden's, two doors to the westward of McPherson's, also kept the shutters up and the doors secured. The smoke was in such volumes at and from McPherson's that witness momentarily expected to see it burst into flame. This smoke must have proceeded from the body of fire that prevailed in the buildings at the rear. Mr. Chafe, a clerk of the plaintiff's, and others, deposed to the carrying off of the goods and contents of the stores, and, at the time of the abandonment of the premises by plaintiff, witness and others, there was no fire apparent in the shop or in the parts of the premises down the yard, but all was ablaze on the outside, and

when they were engaged in loading the last cart from the cellar door he observed smoke spreading in it. This was before the crowd or people entered the premises; they rushed in after the witness was obliged to leave and carried away goods from the shop. He left for a short time and on returning about midnight he endeavored to get into the premises by the rear door, but was driven back with the smoke, and apparently the lower ware-room was all on fire. He went round to the front of the shop and found that the firemen had their water hose there playing on and pouring into a fire that prevailed in the shop and was coming up through the floor. The water was thrown into and through the shop into the show-rooms. The matters deposed to by this witness were confirmed by the testimony and evidence of others who were subsequently examined, who also testified to the particulars of the burning which took place and the means used to extinguish it. In some of the apartments in the upper stories the goods were not reached by the water, but were scattered about the floors, and, such as had not been carried away, were so trampled on and handled and rendered comparatively of no value. Mr. Duder, another witness, deposed that he accompanied the plaintiff when he returned from Rankin's corner to re-enter the premises, but was obliged, from the density of the smoke, to give up the attempt and retire from the place.

Mr. Dunn, one of the witnesses for the defence, was in charge of the firemen on this occasion, and described the extent of the fire and the exertions used in keeping it in check. He discovered fire on plaintiff's premises, in the cellar, store, and also through a narrow hatchway between the front vestibule door and the iron railing at the outer entrance; the place was full of smoke. His hose was worked from a steam engine and the water drawn from the harbor was abundantly supplied. The pipe attached to the hose was placed in the hatchway and the water forced down through the aperture and into the cellar and also into the shop. He brought the hose to the rear and by the back stairs, applied it in extinguishing the fire burning at that time in the shop. At the time he saw some half dozen people removing goods from the shop; this was between the hours of twelve and one. Others of his party deposed to the like occurrences. A policeman also deposed that when the fire was at Bowring's store, he saw people carrying goods away from that place, and later on from McPherson's store, but he did not enter the premises and could not prevent the parties from

taking the goods. He heard some talk of powder being in Bowring's, but did not mind what was reported about the circumstances.

Now that we have fully detailed the substantial facts as given in evidence at the two trials had upon this claim, and carefully considered the whole of the proofs, the findings of the juries and the arguments of counsel, it remains to state plainly the conclusion at which we have arrived.

Some considerable time after the argument was heard on the motion for a new trial, and after mature and lengthened consideration had been given to the matter submitted to us, to accommodate counsel, and in the interest of the litigants, we caused to be filed a memorandum of the opinion we held and the judgment we would more formally deliver in these cases.

Since the filing of that document, we are informed by defendant's counsel that the Northern Assurance Company have accepted the judgment and satisfied the claim of the plaintiff against them, as we then adjudged.

It is to be regretted that the parties to these protracted proceedings did not avail of the terms and conditions of their contract, and in pursuance of conditions 13 and 14 endorsed on the policies of the Guardian and General, have referred the ascertainment of the extent of this loss to arbitration. If the court had been earlier apprised of the nature of the dispute, the observance of the terms of that condition and of the agreement proposed by the plaintiff in pursuance thereof, would have been enforced, if insisted on. A compliance with and fulfilling of the terms of that condition should be regarded as a condition precedent to the exercise of the right of action under such contracts.—*Scott vs. Liverpool Corpora*, 28 h., J. Ch., 230; *Viney vs. Bignold*, 2 B. D., 162, &c.; *Trainor vs. Phoenix Fire Insurance Co.*, 65 L. F., p. 825. But it would appear that for some undisclosed reason the defendant companies declined availing of the means provided by themselves for the adjustment of such differences, and preferred leaving to this tribunal the ascertainment of the particulars and *bona fides* of the claim and the determination, so far, of their legal liability to respond to it.

Now, as already stated, the plaintiff entered into a contract of indemnity with the Guardian Assurance Company on the 3rd of September, 1891. In the policy which forms the contract it is recited that the plaintiff, having paid the premium "for insuring from loss or damage by fire" the property of the plaintiff described in the body or operative part of the policy,

consisting of dry goods, haberdashery and general merchandize contained in his shop and ware-rooms at No 277 Water street, the company would be subject and liable to pay or make good to the assured * * "all such loss or damage as shall happen "by fire to the said property from the 3rd September, 1891, to "the 3rd day of September, 1892, amounting in the whole to "no more than the sum of \$4,800."

We have seen that the liability of the insurers is said to have attached by reason of the loss of the goods in question during the great conflagration of July, 1892. We have also seen how this claim has been met and the character of the grounds relied on by the defendants in their pleadings by which they considered they are entitled to be relieved from that liability.

In the consideration and disposal of the questions raised at first we experienced some difficulty and uncertainty because of the novelty of the action in our courts, the consequent absence of precedent, and for guidance the comparative dearth of English authorities or judicial rulings having a direct bearing on the main features of the case.

Now that matters of defence have been fully enquired into and mainly disposed of by the Juries, we find that two important contentions only remain to be disposed of. These contentions are set out in the notice of motion already given in detail. Under these the defendant companies deny their liability for any loss or damage suffered by the plaintiff by reason of the goods, or any portion of them, having been abstracted and carried away, or for any loss resulting from the trampling, handling, or breaking, from any endeavour of the parties to abstract, steal or carry away such goods; that they were alone liable for such loss or damage as was the direct result of the action of the fire and of the means used in extinguishing it. They lastly hold that the answers of the juries to the questions submitted to them do not amount to a verdict.

On turning to the contract we find the words used to express the intentions of the parties are "for insuring from loss or damage by fire," and to be answerable for "all such loss or damage as shall happen by fire to the property insured." Now these words are to be construed in their ordinary and popular sense. If the argument on this part of the defence, vigorously and ably advanced by defendant's counsel, be the correct and only reasonable interpretation in law of these words, then no obligation would apparently rest on the companies other than to indemnify for

loss by actual ignition of the property so insured. Under it no loss would be covered, nor would the assured be indemnified against any loss or damage he might suffer in his goods and effects if a fire occurred in his house unless such goods were actually destroyed or injured by direct contact with the fire. Under such a construction what justification would there be for the many exceptions we find established under the rulings of both English and American courts of law in their adjudications on these very terms, and the rights of insurers and assured as embodied in these policies of fire insurance? Such a hard and fast interpretation would not favorably compare with the well-considered ruling of Kelly, C. B., in the case of *Stanley vs. The Western Insurance Company*, 3 L. R., Ex. 73. "Any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or the throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purpose of checking the progress of the flames; in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy." This must be found to be a construction in keeping with sound reason and with the spirit and intention of the contracting parties. If, after the plaintiff was forced, under the circumstances detailed in evidence, to leave his premises and abandon his goods, then believed to be hopelessly lost, and during the existence of the fire on his premises some of these goods were carried away by strangers, does it not appear that such a loss may reasonably be attributed to the fire and be regarded as one of its results? "We are bound, it is true, to look to the immediate cause and not to some remote or speculative cause." But in view of the physical facts, as witnessed by disinterested observers on this particular occasion, there is no room for speculation as to the immediate cause by which the goods were lost and damaged. Only some sixty feet on the opposite side of the street the houses were in flames and being rapidly consumed; immediately to the eastward, on the adjoining premises, the fire existed, and was extending itself to the rear where partially wooden erections were on fire. The smoke nearly enveloped plaintiff's premises, and he and his employees under such circumstances hastily abandoned the shop, regarding the situation as hopeless, and the loss of the goods and effects therein as inevitable. The fire had taken hold of the lower part or cellar store of the premises; and at the same time these parties en-

tered the premises and plundered and carried away quantities or parcels of the goods, the loss of which is now claimed; it must have been at considerable risk and danger. If the takers of these goods had cast them from the shop into the street with a view of saving them, and they had been there destroyed and lost, we presume there would be no question raised as to the right of the assured to be indemnified therefor. The cause of their loss would not indeed be remote or call for inquiry or speculation. In a quotation contained in *May on Fire and Life Insurance*, v. 2, p. 417, in *re-Howard Fire Ins. Co. vs. Norwich and N. Y. Transp. Co.*, N. S., the grounds of the operation and application of the principle of cause and effect are aptly and clearly defined. The quotation states, *inter alia*, that "there is undoubtedly difficulty in many cases attending the application of the maxim, *proxima causa non remota spectatur*, but none when the causes succeed each other in order of time * * But when there is no order of succession of time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

We have here this looting being carried on in the manner described by the witnesses whilst the premises are in part apparently on fire and abandoned, for the reasons stated, by the proprietor. Ultimately the goods are found, partially burnt and rendered comparatively useless by the means used in extinguishing the fire and partially by the conduct of the depredators. To which of these causes under such circumstances can the effects, the results of this condition of things, be attributed?

In the case of *Evrett vs. The London Assurance Co'y*, 19 C. B. Rts., p. 130, it is observed in the judgment of Byles, J., that the words "loss or damage occasioned by fire," mean loss or damage either by ignition of the article consumed or by ignition of part of the premises where the article is—in one case there is a loss, in the other a damage, occasioned by fire. In the present instance these circumstances were found to have occurred, as the subject matters of the assurance and the premises in which they were kept were found to have been on fire.

Now, as to the express rulings of courts of justice and the reports and principles laid down in available authorities upon this subject, we find the case of *Levi vs. Baillie* 7 Bing., 349. The report of the case is very brief, but it is stated to have been an action on a policy of fire insurance. The plain-

tiff, an upholsterer, had insurance to the amount of £1,000 effected on his stock. The premises were burnt, and in his affidavit furnished the company he claimed £85 by damage to his goods in removal, and £1 000 for goods that had been abstracted by the crowd at the fire. He obtained a verdict for £500. The report is silent as to any exception having been taken on the ground of the theft or looting by the crowd and the alleged loss on account of it. This verdict was set aside and a new trial granted, but on the sole ground of alleged perjury on the part of the claimant, inasmuch as the finding of the jury for £500, instead of the whole amount sworn to by the plaintiff, amounted in effect to a verdict for the defendants under a condition which avoided the policy if there were any fraud or false swearing in plaintiff's claim. No exception appears to have been taken to the verdict on the ground of non-liability because of the loss of the goods by the stealing directly alleged to have been the cause of it and of the whole of the property in question.

We find in the courts of the United States and in the authorities relating to cases judicially dealt with there, that damage resulting from *bona fide* efforts to save property from fire, as by water, breakage by removal, and by loss or theft consequent on the exposure occasioned by the fire, are within the loss covered by a policy against damage by fire. The theft must be one of the consequences of the fire or removal, and, if so, the time of the theft, whether at the time of the fire or afterwards, is immaterial.—*Newmark vs. Lon. & Liv. Fire Ins. Co.*, 30 Mo., 160; *Fernandez vs. Merchant's M. Ins. Co.*, 17 La. An., 131; *May F. and L. Ass.*, v. 2, p. 104.

In the Canadian courts we find from authority that the loss of goods by theft during a fire is held within the risk. In the case of *McGibbon vs. The Queen Ins. Co.*, reported in *Lower Ca. Jur.*, v. 10, p. 227, it was held that under the terms of the contract between the insurers and insured, whereby insurance was effected for loss or damage by fire, that the insurers were liable for losses to the insured by goods stolen at the fire.—*Thomson vs. Montreal, &c.*, 6 U. C., (Q. B.), 319. We find further that the rule of attributing the loss to the proximate and not to the remote cause in a claim arising under a policy of fire insurance was referred to and applied in the determination of the case of *Marsden vs. The City and County Assurance Co.*, L. T. R., v. 13, p. 467. Insurance was effected upon plate glass window, from loss or damage arising from any cause whatsoever except from

fire, breakage, &c. It appeared that during a fire in the neighbourhood, and whilst the assured was removing his goods, the mob broke the window. This breaking was held to be the proximate cause and not the fire, or the threatened approach of fire. That may have been well decided, but the facts in that case are not in accord with the present circumstances. In the policy there sued upon there was an express exception against damage by fire, and exemption from liability for loss resulting therefrom. It would also appear that the windows were covered and protected by shutters. No part of the shop or goods was on fire, but the assured, fearing their destruction by fire, was having them removed to a place of safety when the crowd tore the shutters from the windows, shattered the glass, and plundered the property from the shop. It was held that the loss or damage was attributable to the action of the crowd, and that their conduct was the proximate cause of loss. Obviously the cases differ in the nature of the contract and the circumstances attending the loss. There was an exception made in express terms to the risk undertaken by the insurers. We have no such exception to the obligation assumed under this contract, although in the policy of the Northern Assurance Company such a provision is properly inserted, and in our determination of these questions in relation to that company we have given them the benefit of our estimate of the effect of that clause on the claim of the plaintiff against them.

In the policies of the Guardian and General Assurance Companies, there is no mention of any exception or limitation, or qualification in the condition by and under which they exempt themselves from liability on other cases.

It has been well and authoritatively laid down that there is a strong analogy between cases or claims arising under Marine Insurance and Fire Insurance policies, and it is stated that in cases arising under the latter the rule of marine insurance seems to be followed.—*Porter Laws of Insurance*, p. 124. And although these policies of insurance expressly guard and except against risk of loss by thieves, still we find that where a ship was run ashore owing to a fire, and goods were landed therefrom, and were subsequently plundered or destroyed by landmen, and never came again to the hands of the owners, it was held to be a loss by the perils of the sea. For instance in *Bondrett v. Hentigg*, *Holt, Rep.*, 1817, p. 149, in the declaration it was averred that the goods insured were saved from the wreck and landed on the shore, but were there plundered and de-

stroyed by the natives. It was held the plaintiff should recover as it was a total loss from the perils of the sea. Under one of these marine policies where goods were insured against immediate loss by fire, a collision occurred which caused a fire to break out. The vessel sank before the fire reached the goods. It was held that if the goods would not have been lost but for the fire, it was a case of loss by fire. It was further held not necessary that the insured property should be injured or consumed by the fire.—*See May on Insurance, vol. 2, p. 417.* And also in the case of the *Ionides*, 19 C. B., N. S., p. 130, where the vessel was insured under a policy warranted free from capture * * and all the consequences of hostilities, riots or commotions. The vessel was lost at Cape Hatteras in consequence of the master having mistaken his course through the removal of the light at the Cape by the Confederate troops. It was held that the *proximate* cause of the loss was a peril of the sea, and not the hostile act of the confederates, and not therefore within the exception. These rulings indicate and determine the current of judicial interpretation applied to the meaning to be attached to the terms of these policies. The theft was a consequence of and immediately resulted from the fire. The insurers had the making of their own conditions or terms, and in the case of the Northern the exemption from such a liability was expressed by them; and recognizing the importance and extent of the business conducted by the other two well established companies, such an exemption must have been present to their minds, and if intended to be availed of should also have been unequivocally stated in the conditions of their policies.

We further consider that the assured, under the circumstances, did all that a prudent and uninsured man could do in his endeavour to preserve his property from destruction, and in the situation and surroundings there was immediate danger and not a bare or remote apprehension that the fire, at that time, would reach the place, and as it subsequently did, to the loss and damage of his goods. As to the plea and contention that the loss by plunder was occasioned by or the result of a civil commotion or riot in the city during the conflagration, it is needless to observe that no evidence was, or could be produced in its support, and that it was abandoned as untenable under the circumstances on the part of the defence.

In reference to the alleged failure on the part of the assured to notify the companies of his loss, and to furnish them with a

particular statement thereof in accordance with the terms of the condition endorsed on the policies, it must be observed that the evidence of what transpired between him and the agents in that particular was not in any way impugned. He notified them of the loss on the day following its occurrence. The persons authorized to receive that notice on behalf of the insurers, attended at the premises, and obtained all the information which it was the object of the notice to bring to their knowledge.

The delay that occurred in furnishing the details called for after the agents had been supplied or furnished with the first, or rough statement, accompanied with the statutory declaration, was occasioned entirely by themselves and at their express desire. The assured, however, appears not only to have furnished a particularly reasonable and specific account under all the circumstances of the case, but the insurers had access to his books, and all the documentary proofs of the particulars of the loss as were within plaintiff's power to furnish. In proof at the trials these matters were thoroughly analysed in the course of the examination of the plaintiff and his employees. These two conditions of notice and furnishing of statements of loss have in all such cases a most important bearing on the right of the plaintiff to recover in his action against the insurers, as to a matter of notice; in its absence recovery would seem to be out of the question, and compliance with the condition of furnishing accounts is of nearly equal importance, and is referred to by *Pollock B. in 8 Ex. R.*, as follows: "Such a condition is in substance most reasonable, otherwise a party might lie by for four or five years, after the loss, and then send in a claim when the company perhaps had no means of investigating it."

We find it stated in evidence that these preliminary proofs were not objected to by the agents, but the adjusters called for further particulars, and in effect required that the assured should distinguish between, and particularise, such goods as had been lost on the premises, and such as had been lost by being abstracted during the fire. This was stated by several witnesses to be an utterly impossible requirement to fulfil, and such it was very rightly and sensibly found to be by the juries. This is quite in accord with the principle laid down by *Porter* at page 197, that this clause in policies is interpreted to mean that the assured shall give evidence in such statements which ought to satisfy reasonable men, and also that if the proof fur-

nished the directors be reasonably satisfactory, the law will not allow them from their perverse obstinacy to withhold redress. But the proof in this matter is undoubtedly upon the assured, and he must show that the goods were on the premises, and were lost, damaged or stolen. This in our judgment has been done to the utmost of the ability of the assured and as far as could reasonably be expected under the circumstances.—*See Harris v. Lon. & Liv. Fire Ins. Co., 10 Lower Can., Jur., p. 268.*

As to the alleged insufficiency or incompleteness of the findings of the juries, we cannot conceive in what manner under the evidence they could have returned further or other answers than those on record to the questions submitted to them. After returning a general verdict in each case, they categorically state the facts that the fire which occurred on the premises of the plaintiff on the occasion in question was caused by the sparks that came from the opposite side of the street. That the plaintiff and his assistants remained on the premises as long as it was practicable, and did all in their power to save the goods. They state their inability to discriminate or assign the proper share of damages to the different effects resulting to the goods from the dominant cause. They cannot state, for instance, what amount of damage may have been caused by ignition, by the application of water, by handling, trampling or stealing. That goods were stolen they find to be a fact, but as to fixing the value of these they very reasonably express their complete inability to do so. In like manner they were unable to estimate the value of the goods that had been removed by plaintiff's orders to Duder's. From the exhibit H. and the evidence bearing on its contents, they were enabled to find that the total loss of the plaintiff amounted to an amount far in excess of the insurance, \$37,707.66.

It is observable that no evidence was adduced by the defendant companies, on whom the burden of such proof rested, to shew that the goods removed or abstracted by unknown persons during the fire, were feloniously taken. Nor was there any attempt made to support by proof these floating charges referred to in the course of the trial, in regard to the origin of the fire or the shortness of stock. In fact there was a perfect freedom from any substantial imputation that could impugn honesty of purpose and good faith observed by the assured under all the circumstances, or that could affect the substantial and real character of the claims now being enforced against these companies.

Upon the whole case, and after well-considering the evidence, the arguments of counsel, and applying the rulings and dicta to which reference has been made, we are unable to find any reasonable or lawful ground warranting a disturbance of the verdicts so rendered by the juries. We are of opinion that the plaintiff is entitled to have judgment entered in his favor for \$4,800 against the Guardian Assurance Co., and for \$12,000 against the General Assurance Co. The juries also found for the interest in the claims, but this we have not included; and as there is no average clause or condition contained in either of the policies, we have not brought the value of the goods saved into account.

Mr. Emerson, Q. C., and Mr. Horwood, for plaintiffs.

Mr. Morison for defendants.

WADDEN v. WADDEN.

1893, November. HON. MR. JUSTICE LITTLE.

Principal and agent—Excess of authority—Liability of principal—Authority requisite for agent to sign lease—Unauthorized act of agent ratified by principal.

In the year 1890 the plaintiff purchased at public auction, from the surviving trustee of Thomson's estate residing in Scotland, the fee-simple in a property situate on Water Street in the town of St. John's. It subsequently appeared that in 1872 the agent of the estate who resided in Newfoundland had granted to the defendant, for a long term of years, the said property, and executed the lease as the attorney for the estate. This lease the trustee repudiated, and contended that the agent had no authority to grant a lease; had no power of attorney or other document under seal, although the lease he had executed was under seal. It appeared from the evidence of letters and rent rolls that the granting of the lease had been brought to the notice of the trustee by the agent. In an action of ejectment by the purchaser against the tenant in possession—

Held—That the granting of the lease having been brought to the knowledge of the principal, it was his duty to repudiate the same if the agent had not authority to execute it. Here the act of the principal was an adoption and ratification of the act of the agent. An authority by parol to an agent to let or dispose of property is as effectual in Newfoundland as the most formal deed.

THIS is an action of ejectment heard before me without a jury.

The land and premises from which it is sought to remove the defendant are situated on the north side of Water street, in St. John's West, immediately to the westward of Holloway street; it originally formed a part of what was known as Thompson's estate. The legal title to the land and the chattels of this estate, for a lengthened period of time, was held by and vested in the late John Sinclair and James J. Grieve, as executors and trustees under Thomson's will. In the year 1850 a building lease of this land was given by them to one Thomas Culleton for a term of forty years, at £12 per annum. The lessee, in due course of time, built a dwelling, shop and out-houses of brick and stone materials on the land so leased to him.

This lessee died in or about the year 1872, leaving a large accumulation of arrears of ground rent owing to the estate, and the buildings were allowed to fall into a very dilapidated condition. Culleton's widow, it seemed, had no means and was unable to meet the rents due or to expend anything in the improvement of the premises.

Mr. A. O. Hayward, then acting as the agent for Thomson's estate and in protection of the interests of that trust, obtained a grant of administration to Culleton's estate, and in due course attempted by public sale to dispose of the lessee's interest in the property administered to by him; but there being no competition at the auction, all of Culleton's interest in the place was purchased in on account of the administrator for £160.—In April of the same year, after such sale, the land and premises were taken over by the defendant, Nicholas Wadden, jr., for the sum of £175 and the immediate repairing and restoration of the buildings to their original tenenable condition.

Moreover, it was agreed that the purchaser would be granted an extension of the term for a further period of forty years from the expiry of the existing term at the same annual rent and subject to the covenant of up-keep and the other conditions and covenants of Culleton's lease. The purchase money having been paid and the place restored to its tenenable condition, a lease was entered into between the purchaser and Hayward, who executed it as the attorney for the trustees of Thomson's estate. Thereafter Wadden, jr., occupied the place, by himself or his tenants, and regularly paid the rents and conformed in other respects to the terms of his lease.

In the year 1890 the fee-simple in this particular property was sold and duly conveyed by the surviving trustee of Thom-

son's estate to the plaintiff, Nicholas Wadden, sr., who also held from the estate property immediately adjoining the place in question.

Upon the occasion of this sale, and not until then, as alleged, was the trustee made aware of the existence of this lease or extension to Wadden, jr., and thereupon he declined to recognize the defendant as a tenant holding under the lease obtained by him from Mr. Hayward. He asserted that no power or authority was ever given to the latter to grant or execute that or any other lease in the name or on behalf of the estate or by on behalf of the trustee. He furthermore maintained that the only parties so authorized, under regular power of attorney to execute such leases, were Mr. Robert Grieve or Mr. W. B. Grieve, who had been, successively, duly empowered as attorneys in fact to act in the premises for the trustee and the estate.

The issue thus raised between the parties necessitated these proceedings at law, as it was considered imperative that the rights of the plaintiff and defendant, respectively, in relation to the land in question should be finally determined.

So far as the parties were enabled, under the circumstances, they have given all the evidence available, and to that we have to confine our consideration, and under the laws applicable to such facts I will in due course state the opinion or conclusion at which I have arrived

It would appear from the testimony of Mr. Hayward that he became agent and factor of the trustees in the matter of the estate some time in the year 1861, when he succeeded one Tubrid, who for a number of years had acted as and discharged the duties of agent and whilst the trustee or trustees were residing in St. John's. In the first instance Hayward acted under the verbal instructions of the trustee, given him in Greenock. Thereafter he furnished annual accounts of his management of the estate with a rent-roll, and communicated by letter with the trustee and occasionally with the solicitor, Mr. McDougall. Some time after his appointment Mr. Hayward, in August, 1863, was informed by letter from Mr. Grieve that he was giving a power of attorney to his son, Robert, to act in his behalf in the matters of Thomson's estate, with full power to appoint Hayward as agent, &c. That a regular correspondence was kept up by him with Mr. Grieve and occasionally with Mr. McDougall in relation to the condition of the estate and its management by him as agent.

He deposed that all matters of any moment or interest, and all actions of his in the discharge of his duties as agent, were brought to the knowledge of the trustee and subnitted for his approval; that the rent-rolls were annually furnished, and on these the names of all tenants appeared with the rental to which they were subject, the arrears (if any), and the extent of the interest or term of the lessee under each lease; that in the regular course of business, after the defendant had become a tenant as the assignee of Culleton's interest and lessee of the extended term, his name appeared as Nicholas Wadden, in place of the name of Thomas Culleton, in all rent-rolls and accounts thereafter furnished. After the sale of Culleton's interest and the payment of the purchase money, he duly credited in his account with the trustee the amount received in payment of the arrears, and in his letters covering his accounts he further informed the trustee that the tenant had also made the required repairs to the premises.

He stated he frequently consulted Mr. R. Grieve whilst here in relation to the business of the estate, and on that gentleman leaving this country, he (Hayward) consulted in like manner with Mr. W. B. Grieve, but was directed by both invariably to act as he thought best in the interests of the estate.

It also appeared that plans of the property had been made and furnished the trustee, and on these the name Nicholas Wadden appeared as holder of the lot in question; that he had granted extensions of leases to several tenants, among others to Scott, Wall and one Goodall, with an increased rent, but in the present case, owing to the large amount expended in repairing the premises, no increase was made in the rent as paid under Culleton's lease.

At the time of granting this extension he had also given a lease to a person named Feehan of a vacant lot forming part of the estate, situate in close proximity to Culleton's. The trustee was informed of both incidents, as will appear by reference to the letters interchanged in 1874, and expressed approval of what had been done in that as well as in the matter of Culleton's tenacy. He further deposed that not only was such written authority given him by the trustee, but that all through his acts were in consonance with his instructions and were fully approved of by the trustee. From the trustee's correspondence the witness puts in evidence the following letter of March 6th, 1888: "I have to acknowledge receipt of your favor of the 12th Dec. . . . I am most anxious that no

outlay should be undertaken for any houses out of lease, far better to *let the ground again*, with a sum to be paid you for the house then on it, and have the parties bound to rebuild to your satisfaction, or put up a new house, and so prevent the estate coming under any advances whatever. Be good enough to adhere to this." And, under date the 17th June, 1879, he states the trustee wrote him (Hayward) as follows: "I have consulted with Mr. McDougall in regard to the leases and the renewal of leases shortly to expire. You can grant new leases of forty years, subject to a stringent clause of 'up-keep,' but do not think it desirable to grant renewals until the present leases are in most cases more nearly run out, unless in extreme cases of great dilapidation; and after consulting with my son . . ." On another occasion, under date July 18th, 1881, he again states: ". . . Consequently arrears must be paid off, and on the houses being put in order and a binding clause to the up-keep, from time to time . . . reserving power to enter, you will do the best you can in granting extensions . . . No doubt my son Walter will be ready to give you an opinion on any one case, but you cannot expect him to assume any responsibility." Extracts from Mr. Hayward's letters and rent-rolls and accounts supplied directly to the trustee, might be given in corroboration of the statement of facts and circumstances appearing in the evidence we have thus summarised. Most of his letters, rent-rolls, &c., were said to have been destroyed in the fire of July, 1892.

On the other hand it may be noted that, the trustee being dead, the only person who might be regarded as competent to speak with exactitude on the relations existing between the trustee and Hayward, and the particulars of the correspondence that passed between them, is Mr. McDougall, the law adviser in Greenock of the trustee in this estate, and with whom Hayward had a correspondence. This person's examination was, therefore, obtained under a commission from this court, and was produced and used during the trial. From the matters deposed to by this witness, it would appear he was aware Hayward acted as a factor or collector of rents and in looking after the tenants and property from January, 1861, until the sale of the estate in 1886. He believed that Hayward received no written authority from the trustee, and certainly no power of attorney was ever granted by the latter to him empowering him to act as attorney in the premises,—no authority, consequently, was given him to execute a lease on behalf of the

trustee The agent accounted half yearly, and transmitted rent rolls during the time of his agency, and witness had no personal knowledge that Hayward had granted and executed a lease of Culleton's holding to the defendant. Until asked to give evidence in this case he knew nothing of the lease to defendant. Both he (Mr. McDougall) and the trustee, upon being furnished with the list of tenants in 1882, understood that the name substituted therein for Thomas Culleton was that of the plaintiff, Nicholas Wadden, and the trustee was entirely ignorant of the granting of this lease to defendant. But they were aware by letter from Hayward that the original lessee's interest was sold for some \$700. The plaintiff having been for many years a tenant on the property, it was believed he had also become the tenant of Culleton's lot, immediately adjoining his own. This impression was strengthened by the circumstance of the two lots, as indicated by the plans and rent rolls furnished by Hayward, being "slumped" together under the one name, "Nicholas Wadden."

Tubrid, who preceded Hayward as agent, had been merely verbally appointed, and acted whilst the trustee resided in this country. His powers and duties, as stated in the evidence taken under the commission were, it was presumed to be, such as Hayward was authorized to perform. And it is found that the original lease granted in 1850, to Culleton, for forty years, was executed by Tubrid as attorney for the trustees. We also find in the same evidence a letter written by Hayward to the trustee on the 8th day of September, 1874, in which the writer states, "I accepted £50, in full, from Culleton's estate. Nicholas Wadden purchased the property, which was in a most dilapidated state; he will be a good mark for the future rent. I have given him a long lease, and he has the property in thorough good repair. I have also let the vacant piece of land, which the late Mrs. Culleton gave up years ago, to Mrs. Feehan for £6 a year."

From the evidence of the plaintiff himself it appeared that the expenditure under that assignment on the premises, in the way of repairs, amounted to about £200.

From the facts set out in evidence taken in Greenock, it is also stated that the fee-simple of this estate was finally disposed of in 1887, and thereupon in a letter to Mr. McDougall the trustee states: "I am entitled to say that we have been very lucky in realising this estate, and I think we may claim good management." It was deposed to by Mr. Robert Grieve

that from the receipt of his power of attorney in 1860 up to 1872, he gave but slight supervision to the business connected with this estate, having trusted Hayward entirely in his actings and intromissions as factor therein. Mr. W. B. Grieve, in 1872, succeeded Mr. Robert Grieve, under letters of attorney from the trustee, and from that time until 1886 had no knowledge of the existence of this lease. Hayward during that time acted in a subordinate position, collecting rents and looking after tenants. He also prepared leases and submitted them for the witnesses' signature. Neither did Hayward communicate with him in reference to the sale or assignment of Culleton's interest. The trustee communicated his refusal to him in 1886 to be bound by the lease and denied its validity or any authority given Hayward to grant it. He was aware that Hayward dealt directly with the trustee; and owing to the unsatisfactory management of the affairs so entrusted to the agent, another was appointed in his place a short time before the whole property was disposed of. This then would appear to be the gist of these parts of the testimony regarded as really relevant to the substantial points at issue in the proceedings. Many letters and other documentary proofs on the part of the estate, also appear to have been lost in the fire of 1892.

Under these facts and data it is reasonable to assume that from the inception of the duties undertaken by Hayward, he fully understood he had the power and authority of giving extensions of old terms and of granting new leases to desirable tenants. We find, for instance, after a fire that destroyed some of the property, in writing to the trustee in 1867, he observes, * * "none, of course, will build without an extension of the term. I would suggest that you leave the matter to me and permit me to do so in such cases, as I may deem it advisable to extend. Thus, over the head of the attorney, in fact, then in St. John's, he directly communicates with the trustee in Scotland, and subsequently grants extensions and also makes express reference in his letters to the granting of leases of land not previously built on or under lease. This leasing to Wadden occurred in 1874, and mention was made of it in Hayward's letter to the trustee in September of that year, "that Nicholas Waddon had purchased and would make a good tenant." The agent also remitted £50 to wipe out Culleton's arrears, and the name of the substituted tenant thereafter appears under the extended term, and Culleton's name is dropped and known no longer in the affairs of the estate. No letter had been pro-

tual without the formalities of a deed. Furthermore, we find in Story on Agency, and in Kent's Commentaries, it is laid down, that where a seal is not necessary to the contract, if the agent had power to execute it, the principal will be bound though the agent attached a seal, and that a contract for the sale of lands signed and sealed by the agent of the vendor is binding, though the agent's authority to make the contract was not under seal.

It is scarcely necessary to point the application of this language, and the principle embodied in it and so aptly and clearly stated, to the facts and circumstances in this case. The agent here, under the authority so conveyed to him, in the first instance, executed a lease, it is true, under seal, giving and granting an interest in the land in question, and under this ruling it followed that the validity of the lease is not affected by reason of the agent's authority being created by a writing not under seal.

I am, then, clearly of opinion, that the contention resting on the ground of informality in conferring the authority in question must fail, as well as that resting on the ground that the agent exceeded his authority in executing a document under seal on behalf of his principal.

There is another view of this case which shows the position the parties would be in if a lease had not been executed, but only an agreement or an arrangement for one had been made between the agent and the tenant, the latter having on the strength of the undertaking, expended a large amount in repairs on the property agreed to be conveyed. The following extract from Story on Agency, 9 ed., p. 52, sufficiently and appropriately illustrates the consequences attending a claim made by the tenant for a lease under such circumstances:

"A conveyance of land to a purchaser for a valuable consideration, made by an agent of the owner, authorized by letters of attorney, not under seal, to sell such land, is in equity evidence sufficient of a contract to convey, to sustain an action by such purchaser against the principal for specific performance of such contract." In connection with this quotation, reference can be had to the case of *Harrison v. Jackson*, 7, T. R., 208.

Just here, it may be well to observe on the fact that implicit confidence appears to have been placed by all parties in the agent, and as stated by one of the witnesses, "but slight supervision to the business of the estate was given by him (the wit-

ness), having trusted entirely in its actings and intromissions to Hayward as factor therein."

Being aware of the trust and confidence thus reposed in him it was incumbent upon him to have observed greater particularity and to have acted with greater care and precision in executing the document in question. Finally it must be observed that, independently of the authorization, deposed to as preceeding the making of the lease, we have the subsequent acts of the principal, assenting to and acquiescing in what had occurred, all of which must be regarded as an adoption and ratification thereof.

I find there is sufficient proof in support of the authority of the agent to grant and execute a lease of this land, and that the validity of the lease being established, the defendant cannot be disturbed in his occupancy thereof under these proceedings.

Judgment will accordingly be entered in favor of the defendant.

Sir J. S. Winter, Q. C., and Mr. Morison for the plaintiff.

Hon. Mr. Morris for the defendant.

GOSS *v*. GUARDIAN INSURANCE CO.

1894, *April*. HON. MR. JUSTICE LITTLE.

Policy of Insurance—Fire—Re-lease—How far re-leasor estopped by.

The plaintiff was insured in the defendant company; the property insured was destroyed by fire; the defendant refused payment on the grounds that the plaintiff had no interest in the property insured by reason of certain insurance covenants contained in his lease. The company, however, paid the plaintiff, in addition to other insurance effected on stock, a payment *ex gratia* one-third of amount claimed, and took from the plaintiff a release "in full discharge of all claim." The plaintiff contended that this release was given by him in relation to other insurance. In an action for the insurance under the policy less the payment made—

Held—That the evidence disclosed the existence of a substantial interest in the premises by the plaintiff at the time of the loss;

Held—That the plaintiff was not estopped by his release and might show the circumstances under which it was given. The release was only evidence capable of being rebutted by other testimony. Estoppels ought not to be allowed unless plainly and clearly established.

THE trial of this action took place before me without a jury.

In the statement of claim the plaintiff seeks to recover the sum of \$600, being the amount insured by the defendant company under a policy of assurance against fire issued in the year 1891 upon a building used as a dwelling-house and shop, brick built and slate roofed, situate on the north side of Water street, in St. John's. The building was totally destroyed by fire in July, 1892, while the policy was in force.

To this claim the defendant company pleaded that they satisfied the claim of the plaintiff by payment to him before the action was brought of the sum of \$800 in full satisfaction and discharge of all claims and demands of the plaintiff under the policy in question, and that the causes of action were released by release executed by the plaintiff and dated the 10th day of August, 1892.

The plaintiff took issue on these pleas.

The case was fully heard before me, and judgment in due course was orally delivered in favour of the plaintiff for \$400, an intimation being given that, for the information of the parties, a written judgment would, if necessary, be subsequently filed.

I now, therefore, briefly but sufficiently set out the facts and circumstances appearing in evidence, and the grounds upon which I rest the judgment arrived at.

The plaintiff became possessed of the premises, upon which the insurance was effected, as assignee of the remainder of a term of years held therein by one Gear under lease from the estate of the late Walter Baine. The interest of the plaintiff under the lease expired in the year 1889, and after a short time there was a renewal of the original term with some additional or altered conditions. Under the renewed lease he was occupying the premises at the time of their destruction by the fire, which almost desolated the whole of that part of the city in July, 1892.

In the month of October, 1891, he effected insurance with the defendant company on the house and shop, and also upon his stock in trade therein, in the sum of \$1,200, under the one policy, in equal proportions.

The stock in trade and all of his effects were also burnt and totally lost in the fire of July. The policy, as already stated, was in force when the liability of the company attached.

Subsequently the plaintiff in due time furnished his statement of claim and declaration of loss to the adjustor and agent

of the company, and received \$600, the amount effected on the stock; but they declined to recognize his claim for the insurance on the house upon the ground that he had no interest in it, as the lease under which he claimed had, as they alleged, expired in the year 1888.

At the same time the plaintiff furnished the company with a claim and notarial declaration of loss, under another policy alleged to have been effected with them, for \$400, on a frame building situate on the north side of Duckworth street, and also destroyed by the fire of July of that year.

This latter claim is not in question here, and merely enters into the case through the testimony given by both parties in relation to the alleged adjustment and discharge in full given by the plaintiff.

Admittedly then, the whole case is reduced to a determination on the question of the extent of the interest, if any, held by the plaintiff in the Water street property at the time of the fire, and also as to the nature and effect, under the circumstances, of the discharge or receipt in full, stated to have been deliberately and consciously given by him to the defendant.

The facts already stated in relation to his interest were deposed to by the plaintiff himself, and other witnesses unequivocally confirmed the correctness of these statements. It was thus clearly established by his evidence that after the expiry of Gear's lease he had concluded a new one through Mr. Grieve, the agent and attorney of the estate, for a term of forty years from the first of November, 1888. This new lease was drawn in Scotland and sent here to the agent for execution in the year 1890 or 1891.

Under the new lease the old rent was somewhat increased, and was duly paid up to the month of May preceding the fire. Some months after that occurrence, and after considerable negotiations, another lease was entered into under which he now holds the land in question for a further term of years.

The crucial point in this statement of the existence of an extended or renewed leasehold interest in the plaintiff in this property at the time of the fire, was further substantiated by the evidence of Mr. Hayward, who had been a clerk in the office of Mr. Grieve, and who deposed that in the spring of 1890 or 1891 he was present when the plaintiff executed a new lease of the premises in question, the rent payable under it was more than he formerly paid, and witness subsequently collected this rent, as he had for some time previously collected the former rents, from the plaintiff.

Plaintiff's son deposed most positively and intelligently to the expiry of the term under Gear's lease in 1888, and to a renewal of the term under a lease entered into by the plaintiff in 1890; the ground rent payable under it was £48 10s. 2d., being an increase of nearly forty per cent. on the former rent. The plaintiff's side of this lease must have been lost in the fire with all his other papers and accounts. The exhibit numbered eight in evidence is plaintiff's side of the present lease, under which the same land is held by him. The question of this leasehold interest in the plaintiff was set completely at rest by the testimony of Mr. Grieve, the agent for the estate. He deposed that Plaintiff, after the expiry of the term reserved under Gear's lease, obtained a new lease with a renewal of the term, and, at the time of the fire in which the buildings were destroyed, there were thirty-seven years of that lease unexpired. The copy or counterpart of this lease was held by deponent up to the time of the fire of 1892, when it must have been destroyed.

With such direct and unimpeached testimony of the existence in the plaintiff of a substantial interest in this property at the time of its loss, this question is placed beyond doubt or cavil.

Under this evidence, unimpeached as it is, there can be no doubt of the plaintiff having had, at the time of the loss insured against, an interest in the property far in excess in value (as will be shown) of the amount of the insurance effected on it. The building which adjoined the plaintiff's was somewhat less commodious, was held by a sub-tenant at a yearly rental of \$400. It was also in evidence that the plaintiff's building was a substantial, well-built brick house, with slated roof, and in good tenantable condition.

Now, as to the release alleged to have been given in full discharge of "all claim" on the defendant company for the amount of the insurance effected on the interest of plaintiff in this leasehold property.

This release, as given in evidence by the defendant company, is in the following terms: "St. John's, 10th August, 1892. Received from the Guardian Assurance Company the sum of \$800, including all expenses and gratuities for assistance (if any), in full discharge of all claim upon them under policy number 2,276,979, for loss or damage occasioned by a fire which occurred on the 8th day of July, 1892, on the premises situate on Water street, St. John's, &c., &c. Signed, John Goss, as-

ured; witness, signed G. Heaton." This amount was paid by Commercial Bank cheque, which bore on its face the words "in full of all claims and demands." It was also signed by Mr. Heaton and Messrs. Winter, agents for the defendant company.

Now, in relation to this payment and the circumstances under which these documents were given, the plaintiff deposed that on making application for the settlement of his claims against the company he was informed that the agent had received a notice from the solicitor for the lessors not to pay over to the plaintiff the amount of insurance effected by him on the said dwelling and shop in Water street, the lessors claiming that the insurance was effected in pursuance of and subject to certain insurance covenants and conditions contained in the lease between the lessors and the lessee. This notice was received by the agent on the 19th July, 1892. In answer to repeated applications made by the plaintiff for payment of the claims the agent, as stated in his own evidence, "declined to discuss the loss with him because the building stood on leased ground and plaintiff had not interest therein, and because he had been served with the notice from Mr. Horwood to hold the insurance money for the lessors, his clients, and not to part with it unless upon their order."

There was another claim, to which some reference has already been made, on account of a policy effected on fee-simple property of the plaintiff, situate in Gower street. The first risk on it was assumed by the defendant company in the year 1888, and, admittedly, delays occurred from time to time in the payment of the premiums. The amount insured in 1891 was \$400; but owing to non-payment of the premiums and after the agent had applied for it without effect, the policy was allowed to lapse.

This was stated by the agency to have occurred a few months before this property was destroyed.

Notwithstanding the persistent demand of the plaintiff, the company declined paying him his claim on foot of that policy. Plaintiff had also informed the adjustor that in the payment of his premiums under that policy he had at times been allowed two or three months before paying, and that now the company were paying the claims of parties who had not paid up their premiums. He repeatedly called and supplied the agent with all the information necessary in making his claim for payment, but without avail, Mr. Heaton persisted in refusing a final settlement.

At the last interview with the adjustor, this receipt was filled up by him, and after plaintiff had been informed and given to understand that he would then be paid \$600 for the insurance on the stock, and a sum of \$200 in full for what he was induced to believe was a very doubtful claim on the Gower street insurance, he signed the receipt now produced. He and Mr. Heaton were alone, and plaintiff was also informed by him that nothing would then be paid on account of the Water street property because of Mr. Horwood's notice, which had not at that time been cancelled or withdrawn. Plaintiff further deposed that he cannot read without using glasses, and on the occasion of signing that receipt and accepting the cheque he did not read them, not having his glasses with him, but accepted the amount in full, as he understood, of all claim for insurance on his stock and the Gower street property.

Subsequently, by written notice now in evidence, dated the 18th of May, 1893, Mr. Horwood apprised the company of the withdrawal of the notice previously given them in reference to this insurance.

The plaintiff's version of the circumstances attending the giving of this receipt differed materially from that of the agent. In addition to the facts already stated from the evidence of this gentleman, he deposed he found on investigation that although the policy covered \$600 on a brick dwelling-house built on leased ground, the lease of which expired in the year 1888 and had not been renewed, he disclaimed any liability of the company, &c.; but, as a gratuity and to assist the plaintiff, he finally arranged, with his full knowledge and ready acquiescence to allow, in addition to the \$600 payable on his stock, the sum of \$200 as an *ex gratia* payment, which was accepted by plaintiff, and the conditions were fully understood by him, and this receipt having been read over to him, was then signed and the cheque accepted in full of all further claim on the company.

These statements are certainly sufficiently conflicting and glaringly contradictory, and if they were not outside of them other evidence and criteria to guide one, it would be difficult to arrive at a satisfactory determination of the questions involved in these proceedings. On this matter of a settlement of the claim for the insurance on the Water street property, I find that Vincent Goss, the son of the plaintiff and a witness whose evidence was given clearly and much more intelligently than the plaintiff's, deposed that he called on Mr. Heaton

about the Water street insurance and inquired if the amount would be paid; the agent answered it would not as the landlord's solicitor had notified the company not to pay Goss; he asked witness if he could produce the lease, and if so, he would be paid; the witness informed him it was burnt, thereupon the agent asked if witness could procure the copy, but was told that Mr. Grieve had had it but it was also lost in the fire. The witness and his father obtained from Mr. Horwood copies of leases of other and adjoining tenants of the same estate. In their covenants and conditions they corresponded with those contained in the lease held by the plaintiff. But they must have been regarded as unsatisfactory, as the company remained unaltered in its determination to ignore the claim of the plaintiff to the \$600 effected on the Water street house.

Under these facts and circumstances and upon this data the plaintiff rested his claim; and the defendant's counsel contended that, under the facts and the pleadings, the defendants were entitled to judgment because of the conclusiveness of Heaton's evidence and the absence of any replication in the pleadings that the defendant company dealt fraudulently with the plaintiff in relation to the arrangement and receipt.

Now, all of the substantial grounds are sufficiently defined in the abstract of the evidence here given, and I think it is manifest that a gross misunderstanding arose between the parties in the first place about the leasehold interest. The defendant company certainly had not been in possession of the information they now possess of the substantial and unquestionable leasehold interest held by the assured in the property. If they had that knowledge at the time of Heaton's settlement with him we should have heard nothing of this litigation. It is true it was the duty of the assured to supply the necessary information in support of his claim; but under the existing circumstances it may be considered that from his own assurance and sworn statement and that of his son, and in view of the terms of Horwood's notice informing the company of the relations of lessors and lessee existing between the landlords and the plaintiff, sufficient assurance of an interest was given to call for fuller inquiry and more consideration on the part of the company before arbitrarily rejecting the claim and concluding the compromise now impugned.

To terminate, then, this rather prolonged inquiry into the circumstances connected with this compromise and the effect of the receipt given by the plaintiff, it will be sufficient to state

that in law a receipt in full for a debt is only evidence of payment, and pleading it does not call for a special replication; issue may be joined on it and the merits or circumstances gone into in evidence. I do not think the plaintiff was estopped by this receipt, and might show, as he has shewn, the circumstances under which it was given. As observed by Holroyd J., in the case of *Lampton vs. Cake*, 5 B. & Al'n, p. 611:—"The plaintiff is entitled to judgment unless he is estopped either by the deed of release or by the receipt endorsed on it. As to the latter, it is sufficient to observe that, not being under seal it cannot amount to an estoppel, but can only be evidence for the jury, capable of being rebutted by other circumstances in the case. * * Estoppels are odious in the law, and, being so, they ought not to be allowed unless they are very plainly and clearly made out."

Nor can we regard this alleged settlement and final discharge of the claim for this special amount as conclusive and sufficient in law to prevent the question being re-opened. Has the case of this assumed bar to any claim on foot of the policy on the Water street property been plainly and clearly made out? On the contrary, I regard it as being surrounded with denials, doubts and conflicting statements and assumptions. It is difficult to see, for instance, what advantage would accrue to the plaintiff in accepting \$200 as a gratuity, in lieu of \$600, to cover a *bona fide* claim for loss. He was perfectly certain of the extent of the interest he had in the Water street property, and it would be unreasonable to suppose he would surrender the amount payable to him on account of that interest under the policy for a smaller sum given as an *ex gratia* payment. However, as already stated, "a receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it, is not conclusive, except as to the person who may have been induced by it to alter his condition."—*Groves vs. Kay*, 3 B. & Ad., 313; *Foster vs. Dauber*, 6 Ex., 829; *Farrer vs. Hutchinson*, 9 A. & E., 641.

In the case of *Cesarini vs. Ronzans, F. & F.*, p. 339, where arrears of salary were sued for and never indebted, and payment pleaded, the plaintiff admitted she had signed a receipt "in full," but that was given in ignorance that it contained the words "in full," it was held not conclusive, and subsequently a verdict was given in favour of the plaintiff.

I believe there was a gross misunderstanding here, and that the plaintiff took it for granted that the compromise arrived at

and the receipt given had relation entirely to the indemnity he claimed for the loss sustained under the policy (alleged to have lapsed) he had effected on the Gower street property. In his mind there was no question about the ultimate payment of the \$600 on his Water street property

Under the facts and all the circumstances, I must find in favour of the plaintiff; giving the defendant company credit for the so-called gratuity of \$200 there would be \$400 still owing the plaintiff on account of the insurance effected on the dwelling-house and shop, and for which amount (\$400) judgment will be entered.

Mr. Scott, Q. C., for plaintiff.

Mr. Morison for defendant.

BRANSFIELD v. BEATTY.

1894, *April*. HON. MR. JUSTICE LITTLE.

Trespass—Right of grantee to waters abutting on land under a mining grant—Power of Crown to grant exclusive rights to the public waters—Imperial Statutes bearing on same.

The plaintiff erected a building on the shore and over the public waters abutting on and near land held by the defendant from the Crown under a mining grant. The defendant notified the plaintiff to remove the building, and subsequently, by their servants, tore down and removed the same. In an action by the plaintiff for damages the defense set up was that by virtue of a mining grant held by defendant the property abutting on the waters over which the erection had been placed was their sole and exclusive property and that the plaintiff was a trespasser.

The Court was of opinion that the defendants were liable for the loss and damage sustained by the plaintiff by the pulling down; that the title set up to the public waters was untenable and in contravention of Imperial Acts relative to the occupation of our coasts for fishery purposes. The granting by the Crown of such excessive right would be contrary to public policy and in derogation of public rights secured by Statute. The shores and navigable waters of our harbors cannot be alienated; such a grant would be *ultra vires*.

THE summons and statement of claim upon which these proceedings rest were issued by the commissioner at Little Bay on the 16th day of last August, returnable before this court at its ensuing sittings on circuit at that place.

The proceedings were in the form of an action of trespass, the plaintiff thereby claiming damages to the amount of \$800 by reason of the defendants having, on the 3rd day of the preceding month of July, broken into, pulled down, removed and destroyed a wooden structure or building, erected and completed by the plaintiff on the 26th day of the previous month of June. This building had from that time up to the committal of the wrongs complained of been used as a store or shop and dwelling by the plaintiff.

The case was partially heard before me without a jury at Little Bay, and, at the instance of the parties, further evidence was taken at Pilley's Island and a complete and satisfactory view had of the locus or the site on which the building had been erected and of the environments thereof.

It would appear from the evidence that plaintiff was a trader or dealer carrying on a small cash and barter business along the coast and between the different harbors and settlements in the vicinity of Pilley's Island.

The defendant (Beatty) is the agent and superintendent of the defendant company, who are the proprietors of extensive mining rights, particularly at Pilley's Island, where important mining operations are being extensively prosecuted by them.

The plaintiff, having informed Mr. Beatty of his desire and intention to establish himself in the locality to carry on a small business in groceries and other goods, inquired of defendant if there would be any objection on the part of the company to his building a small store on or near the particular place selected by him for that purpose abutting on the waters of the harbor. It would then appear that from the conversation thus had the plaintiff was led to believe that no substantial objection existed to his undertaking, and early in the month of June he commenced and completed the intended structure.

The spot or place so indicated was situate on north side and in a curve or bend of the shore of Saltwater Pond, which forms the harbor of Pilley's Island. Here he (plaintiff) drove and sunk a number of piles in the landwash or shore extending into the harbor, and about five or six feet from the waterside of a main road leading from the mining establishments by and apast this curve. These piles, it was stated on evidence, were continued out into the harbor beyond low water, and upon them his building was constructed.

The beams or sills were stated to be thirteen feet long, extending over the piles from the line of shore abutting the road.

referred to. The height of the store from the sills to the wall plate on one side was to be about eight feet. This small structure stood about five feet from the side of the road, and was reached by a platform extending therefrom to the door way.

The waters of the harbor, or "Saltwater Pond," at times flowed up to the embankment, the outer piles being, as alleged, outside of low water mark. This building being completed, plaintiff occupied and carried on his business in it on or before the 28th of June, and shortly after received a notice from the defendant requiring him to proceed no further with his work and to remove the building from the locality in which it stood. That no grounds were given or cause assigned for this required removal, and shortly after, for the purposes of his business, he visited Tilt Cove, and on his return found that, by defendant Beatty's orders and under his personal supervision, the building, piles and platform were torn down and removed. The plaintiff deposed that he had in the store at the time of its demolition and removal about \$120 worth of goods, and of these there had been saved articles of the value of \$25. Plaintiff on leaving for Tilt Cove left his son, aged about sixteen years, in charge of his shop and place.

The plaintiff also deposed that it was by his own labour and his son's and that of a handy man the building was erected; that the materials composing the building were rendered useless and of no value to him by reason of the manner in which it had been torn down and demolished. In his evidence he gives an approximate value of these materials, and states that from that time up to the time of trial he had been unable to carry on any trade or business in that place, but had continued a small barter business on the same coast.

The defendant admitted the tearing down and removal of these articles, but stated that the materials of which they were constructed were left on the road side for plaintiff; also, that the few articles composing the stock in trade of the plaintiff were of very little value and were not lost to him or carried away by the defendant, but left on the road to be taken away by plaintiff's son if he were desirous of saving them; but it was stated that notwithstanding this he declined doing so, and that they were there uninjured and intact.

The defence mainly rested on the grounds that plaintiff, without permission or leave expressed or implied from the defendants, or by any shadow of right, had trespassed on the lands at the place indicated, and before doing so was made aware by

the defendant (Beatty) of the rights of the defendant company in the premises. It was claimed by them that by virtue and force of the terms of the grants and leases obtained and held by them and their predecessors in title from the Crown, or the government of this Island, that the lands of that part of Pilley's Island and the land and the waters of Salt Pond forming the harbor and the shores enclosing it, became the sole and exclusive property of the defendant company. In support of this position was subsequently received in evidence a mining grant purporting to have been issued under the great seal of this Island to the members of the defendant company on the 20th day of December, 1888. Under this document, as stated, it is claimed that the lands, shores and (public) waters in question vested in and became the sole and exclusive property of the defendant company.

The evidence on the part of the defence was only recently closed, it having been considered necessary to obtain further testimony in relation to the exact boundaries of the property of the company, and to locate with precision the place on which they alleged the trespass to have been committed.

This having closed the evidence of both sides, I heard counsel, in argument, fully upon the questions and all the contentions relative to the manner in which plaintiff entered into possession, erected his building, was deprived of its use, and expelled from the place so occupied by him.

And then in view of the importance of the questions raised in the claim of title by defendant Company, under their grants, and the interests, public and private, involved in the adjudication to be made thereon, and as it appeared that the judgment so rendered would form the subject of appeal, it was agreed between counsel, with my approval, that I would here finally ascertain and assess the amount of the damages suffered by the plaintiff on the occasion complained of; and that the greater and more important question of the validity, force and effect of the grants and documentary evidence relied on by the defendant company should, under order of this Court, be reserved and submitted to the adjudication of the Supreme Court at a special hearing to be obtained by counsel for that purpose.

Whilst approving of this proposed course for procedure, I cannot allow the matter to pass away from this court without recording the opinion formed at the close of the defence, and subsequently, verbally expressed by me in stating the conclusion at which I had arrived upon the question of damages.

An expression of opinion at such a time may appear to have been somewhat premature, in view of the future hearing of the matter as arranged for; but having completed the evidence and heard the arguments of counsel upon their whole case, I considered it timely and proper to state that, in my judgment, it would be found that the defence resting upon the title claimed under these grants to an exclusive and absolute right over the shores and waters in question would be found untenable. I should, under the circumstances, regard any such claim or title as being directly opposed to and in contravention of the provisions of certain well-known Imperial Acts relative to the use and occupation of the coasts of this island for the general purposes of our fisheries. These statutable provisions are express and unqualified in their terms, and clearly prescribe the extent and nature of the claims that may be acquired on that part of the public domain.

The meaning and application of the terms of these statutes have also on several occasions been submitted to the consideration of the Supreme Court of this Colony, as will be found on reference to our early law reports. It will be found on reference to the reported cases of those times that, under the rulings and decisions of the court on this subject, no such claim or right as the present was recognized. The granting of it would also be regarded as contrary to public policy and in derogation of the rights secured by statute to those of the public immediately engaged in the prosecution of our fisheries. The exercise of these rights of fishery and the use of portions of our sea-board therefor need not conflict with the use of our public lands for the prosecution of mining and other great industries. It will also be found that the shores and navigable waters of our harbors cannot be alienated in the manner and under the conditions contended for. Assuming this to be the principle to be observed and regulating the granting of titles to such lands, it may reasonably be concluded that the grant of such a title by the executive government, unauthorized by legislative enactment, would be *ultra vires*.

However, further comment is unnecessary in relation to this part of the case. The parties, after submitting their contentions thereon to the consideration of the Supreme Court, will have from that body a full and well-considered judgment, determining and settling, so far, the issues raised in this proceeding.

Aside then from the points so reserved, we must express

regret that defendants did not have recourse to their remedy at law for the removal of the building and assertion of their alleged title, instead of violently and summarily demolishing the structure and ejecting the plaintiff in the manner and under the circumstances deposed to.

The pulling down of an erection by a party who has the right to the place on which it stood, and who has been unlawfully interfered with in the exercise of his right by such erection, has, in several cases, been held justifiable,—see *James vs. Hayward*, 5 Rep. ; *Mason vs. Caesar*, 2 Mod., 65 ; *Arlett vs. Elles*, 7 B. & C. ; *Penny vs. Fitzhove*, 8 A. & E., p. 774. But where a building is occupied by the party alleged to be trespassing, it is obvious the act done may be calculated in the highest degree to excite violence and a breach of the peace, and the law will not permit any person to pursue his remedy at such risks.

We have, moreover, in this connection to consider the statement frequently deposed to at the trial and not wholly rebutted by the explanatory evidence on the part of the defendants, entry was made with the knowledge and apparent assent of defendants, and that, at the time of the demolition, plaintiff's son, for his own safety, was obliged to abandon the house.

The defendants, relying on the strength of their title and claim to and over the place or site upon which the erections stood, regarded the plaintiff as a mere trespasser *ab initio*, and, after notifying him of their intention to remove the structure, they forcibly entered upon the place and pulled down and demolished the building and erections of the plaintiff, who was consequently obliged to abandon them and the materials used in constructing them.

From the evidence I must find in favour of the plaintiff; and as to the question of damages, from the evidence particularising his losses, I consider he has been directly and substantially damaged by the acts of the defendants in the premises to the extent of two hundred and thirty dollars, and that he will be entitled to have judgment entered accordingly.

Mr. Emerson, Q. C., for plaintiff.

Mr. Horwood and *Mr. Morison* for defendants.

1894, May. HON. SIR F. B. T CARTER, C. J.

Shipping—Bill of Lading—Shipowner's liability where property is destroyed after landing but before taken away—Condition as to taking away—General usage and port custom.

By a bill of lading, made in the Dominion of Canada, certain goods were to be carried to the port of St. John's, in Newfoundland. The instrument contained, in addition to a long list of excepted risks, the following conditions :— (a). "That the carrier should not be liable for any loss or damage from fire from any cause and wheresoever occurring"; (b). "After discharge the goods should be at the risk of the consignee"; (c). "The goods were to be taken from alongside by the consignee immediately the vessel was discharged." In an action by the consignee against the shipowner for the value of the goods, it appeared that the goods were landed and stored and destroyed by fire on the day after they were so landed and stored. The defendants set up as a defence the conditions and exceptions in their bill of lading set forth, and that the destruction of the goods was from causes beyond their control. The jury found for the plaintiff: (1). That the plaintiff had not sufficient time to remove the goods; (2). That he used due diligence; (3). That the landing was for the convenience of both parties. On a motion by defendant the verdict of the jury was set aside and it was—

Held—That the shipowner's obligation was performed by a delivery at the usual wharf. The shipowner is not bound to give the consignee notice of arrival and readiness to discharge, or a reasonable time to take the goods from the ship's tackles, the consignee is bound to take the goods as they are passed out of the ship.

THIS action was tried before Mr. Justice Little and a special jury, and was brought to recover the value of one hundred and fifty barrels of flour, which was landed from the steamship *Bonavista*, of the defendants, and shortly afterwards destroyed by the fire of the 8th July, 1892, which devastated this town of St. John's.

By the statement of claim it appears the goods were, in June, 1892, shipped by a through bill of lading on the Grand Trunk Railway of Canada to be transferred to the defendant's s. s. *Bonavista*, then lying at Montreal, in the Dominion of Canada, and were so shipped, to be delivered to the order of Blaney, Brown & Co., or assigns, at the port of St. John's, upon payment of freight immediately upon discharge of the property. The material clauses of the bill of lading are professed to be set out in the statement of claim, but, as the only question is as to the liability, if any, of the defendants after the landing of the goods, I shall confine myself to such parts, or any omitted from this document, which appear to have a material bearing

on the substantial issue between the parties. It was mutually agreed, among other causes of damage, that the carrier should not be liable for any loss or damage "by fire from any cause and wheresoever occurring," that the ship might commence discharging immediately on arrival and discharge continuously, the collector of the port being thereby authorized to grant a general order for discharge immediately on arrival, and, after discharge, the goods should be at the risk of the consignee, and if not taken by him within such time as is provided by the regulations of the port of discharge, might be stored by the carrier at the expense and risk of their owners. This contract was to be governed, so far as regards the responsibility of the trans-oceanic steamer and her owners, by British law. Clause ten, which is omitted in the statement of claim, is as follows: "The property covered by this bill of lading is subject to all the conditions expressed on local bills of lading used by the steamship or steamship companies carrying this property at time of shipment"; and, finally, in accepting this bill of lading all the parties interested, naming them, agreed to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if signed by the respective parties. "In witness whereof the agent signing on behalf of the said rail carriers and of the said steamer or steamship company, severally, and not jointly, hath affirmed to two bills of lading all of this tenor and date, one of which bills being accomplished and given up to the carrier, the other to stand void. Dated at Montreal, the 27th June, 1892." Signed by the agent.

The plaintiffs alleged the sailing of the steamship in July, 1892; that the defendants were not prevented by any of the causes or accidents excepted in the bill of lading from delivering the said goods to the plaintiff; that they were and are still detained, and claimed \$1,200.

The above bill of lading was put in evidence, as also a copy unfilled of that referred to in clause ten, by which the goods assumed to be marked in the margin are to be delivered from the ship's deck (when the ship's responsibility shall cease), but it was mutually agreed that the ship or owners should not be responsible for the said goods after delivering at the first-named port (St. John's), and among the exceptions to ship's liability is "Fire at sea or on shore at any time or in any place." It was also stipulated that the goods were to be taken from alongside by the consignee immediately the vessel was ready to discharge, or otherwise they would be landed and stored at the expense of

the consignee and at his risk of "fire, loss or injury"; also, "no damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed"; also, "goods at risk of consignees from ship's tackles," and freight, if payable by consignee on arrival of goods at place of destination, to be made in exchange for bills of lading or delivery orders without discount or abatement; and that, in accepting this bill of lading, the shippers or other agents of the owner of the property carried expressly accept and agree to all its stipulations and exceptions and corrections, whether written or printed.

The defendants by their pleading in defence relied upon the conditions and exceptions in the bills of lading as set forth; that the steamship *Bonavista* arrived at St. John's on or about the 7th July, 1892; that the goods were discharged at the customary place and without delay, and were not taken from alongside by the consignees (the plaintiffs) immediately the said vessel was ready to discharge; but therein the plaintiffs delayed and made default, and the goods were landed and stored at a wharf depot or landing by the defendant at the expense of the consignees (the owners) and at their risk of fire, loss or injury, and were at their risk from the ship's tackles and after discharge, and after and while they had been so landed and stored, that before the plaintiffs removed the said goods they were totally destroyed by fire on the 8th and 9th July, 1892, and averred that their destruction was by causes beyond the control of the defendants, and that the damage and loss could have been insured against.

The judge declined to non-suit and submitted questions to the jury for their special finding on the facts, reserving all questions arising upon these and the construction and application of the terms of the bill of lading for the consideration of court. The jury, in answer to question, (1), found the plaintiff had not sufficient time for the removal of the goods from the time of their discharge up to the loss by fire; (2), that the plaintiff used due diligence in endeavouring to take delivery of the goods; (3), that the landing of the goods to the shed was for the convenience of both parties; (4), that none of the goods were taken or removed by plaintiff; (5), the amount of loss, \$855, for which the verdict was entered, subject as aforesaid.

Notices of motion were given on behalf of both parties, for the plaintiff's, to have judgment entered for them; and for the defendants, judgment for them or non-suit or new trial, upon which counsel were heard.

This is one of the many actions arising out of the great fire of July, 1892, brought before this court for adjudication, and is important, as we are informed that there are other parties interested to a large amount, whose property under like circumstances was destroyed by the same calamity. The s. s. *Bonavista* was one of a line of steamers trading between ports in the Dominion of Canada and this colony, and had only just accomplished her unloading late in the afternoon of the 8th July, 1892, when the fire occurred. The part cargo in question, viz., 150 barrels of flour, of the bill of lading for which the plaintiffs were assignees, is admitted to have been shipped on board and duly landed at St. John's, its destination; and the substantial question is, at whose risk and loss this property was when so destroyed, having regard to the contract between the parties and the surrounding circumstances. The contract is contained in the bill of lading produced in evidence at the trial, the material clauses of which, as regards this action, are before set out, and the plaintiffs contend that by the terms of it, the circumstances and the findings of the jury he is entitled to have judgment entered in his favor, while the defendants on the other hand contend that their liability as shipowners ceased on the landing of the goods, which was accomplished in accordance with the conditions of the contract; also from the exceptions in it, and notwithstanding the findings of the jury from the evidence given at the trial, judgment should be entered for them.

The points chiefly relied upon for the plaintiff were that the goods were prematurely landed; that a reasonable time should have been allowed for the consignee to take them from the ship's tackles alongside; that it was unlawful to land them without a permit from the Customs; and that they should have been so placed that the carman of plaintiff could have got them on request. Despatch in unloading is of much importance to line ships regularly trading between certain ports, such as was the *Bonavista*, and these bills of lading and arrangements would appear to have been made with a view to that object, of which consignees generally are informed and prepare themselves accordingly to receive their consignments. In this case the plaintiff had, as he said, transacted a large amount of business with those ships, and was well aware of the routine of the unloading after arrival. On this occasion the ship arrived at seven a. m. Thursday, 7th July, and continued discharging from nine a. m. until midnight, and it was not until next day, about eleven or

twelve o'clock, when he sent his clerk for the first load, that he was in a position to take the goods. The through bill of lading, which includes land and sea carriage, provides, as between the parties themselves, arrangement with the officers of Customs to discharge immediately on arrival, and, upon discharge, the goods shall be at the risk of the consignee; and thus, so far from the discharge being unlawful, we may assume that it was done with the sanction of the Customs' officials, and after the discharge they might be stored at the risk and expense of the owners. The freight and expenses were paid without demur, and the delivery order received. The carman of the plaintiff's store-keeper, Bennett, stated that he went to the wharf of Harvey & Co. about ten o'clock, a. m., on the 8th July. where the cargo was landed as was usual with ships of the line and as such known to the plaintiffs; gave the permit to the checker, whose name he did not know; asked for the flour, and, not finding it, took loads of other goods of and for the plaintiff; was, in the course of the day, two or three times in the shed or store looking for the flour, and continued carting up to about 5.25 p. m., when he took the last load, and then had a look in for the flour but did not see it. It does not appear that he or any other person for the plaintiff spoke to any person connected with Harvey & Co. about the flour throughout the day, and he continued hauling for the plaintiff, taking, as was usual with him, ten loads a day. The fire, which subsequently destroyed the wharf and premises of Harvey & Co. and the goods, commenced about this time. There was no evidence of port regulations or of general usage or custom in St. John's as regards the landing of cargoes from foreign ports, and, as to this, generally speaking, the shipowners' obligation is performed by a delivery at the ship's side, or, at most, on the quay or wharf, and, according to the established course of trade, a delivery at the usual wharf is such a delivery as will discharge the carrier, (*Hyde vs. Trent, Nav. Co.*, 5 T. R., 397), and the manner of the delivery of the goods, and consequently the point at which the responsibility of the master and owners will cease depends upon the custom of particular places and the usage of particular trades, and the special terms.—*Carver on Carriers*, 453, 457; *Gatliffe vs. Bourne*, 4 Bing, U. C., 314; *Petrochimo vs. Bott*, L. R., 9 C. P., 355.

In this matter the wharf for landing cargoes from ships of the line was known to the plaintiffs, as well as the mode or usage of delivery afterwards upon payment of freight, when

to be paid and expenses; and it is not pretended there was ignorance with regard to any of these; and the circumstance that the plaintiff had not perused the through bill of lading until after the fire, and had no knowledge of the contents of the ship's bill of lading incorporated in the first, cannot, I apprehend, be regarded as relieving him from any of its conditions and stipulations so far as they were obligatory upon him, neither is it pretended that the arrival of the ship was not known to the plaintiff, but even if that were so, it could not avail him as the ship owners were not bound to notify him of the arrival or readiness to discharge.—*Harman vs. Clarke*, 4 cap, 159, per Cockburn, C. J., 3 F. & F., p. 174. The contention that the landing was premature in that the plaintiff should have had a reasonable time to take the goods from the ship's tackles alongside is not supported under the contract, the meaning of which is that the consignee is to take the goods as they are passed out of the ship on to the quay or into lighters.—*Fletcher vs. Gillespie*, 3 Bing, 635; *Kindale vs. Levy*, 2 F. & F., 441. For besides the terms of the bill of lading, there was no request or preparation made therefore or otherwise than as intended for taking from the shed as usual.

The expressed stipulations in the bill of lading, which is the contract between the parties, are binding upon each party if sufficient to cover a subject of contention under it without regard to statutable or other port regulations or custom. In *Gatliffe v. Bourne*, 7, M. & G., 865, which went to the House of Lords, the goods were to be delivered to Gatcliffe or assigns in London; they were landed at the usual place of discharge, no notice was given to consignees and they were not there to receive the goods. The same night the goods were destroyed by fire. Held that the delivery was incomplete, as the contract was to deliver to Gatcliffe and not on the wharf. In *Petrochin v. Bott*, supra, by the bill of lading the goods were to be delivered from the ship's deck when the ship's responsibility shall cease, a bale was missing after landing. The court held that the moment the shipowner had cleared the goods from the deck he ceased to be responsible in any way for them although there might be a remedy against the dock company upon whose quay the goods were landed according to usage, or some other person, and with the present case the evidence shews a copy from the judge's notes appended, there was no further interference after the landing of those connected with the ship.

In *More v. Harris*, 45 L. L. P. C., 55, which arose upon a

through bill of lading with the Grand Trunk Railway of Canada, judgment was given to the same effect. The latest case I can find is *Borroman & Co. v. Wilson & Co.*, *Times L. R.*, 416, (1891), decided on a special case. The bill of lading contained the London clause, which is "The shipowners shall be entitled to land these goods (520 bags of flour) on the quay of the docks where the steamer discharges, immediately on her arrival, and upon the goods being so landed the shipowners responsibility shall cease." On the morning of the arrival defendant's brokers paid the freight and demanded delivery overside into barges which were in attendance.

The defendant refused to do so and landed on quay, and, in consequence, the charges (the subject of this action) had to be paid the dock company. The court held that, although by the custom of the port of London the consignee is allowed twenty-four hours after arrival to claim delivery over ship's side, yet all such rights were, however, subject to the special agreement, and it was clear the plaintiffs had contracted themselves out of the custom as they might also out of statutory rights. Besides this contention of the defendants of their right to land immediately, and non-ability afterwards, they relied on the exceptions in the contract set out in the defence as regards loss or damage by fire, or where the loss could be covered by insurance against fire, as it appears that insurance could have been effected upon these goods in the course of transit after the landing. I do not think there has been any default shown as against the shipowners that would render them liable for any part of the amount claimed, and that, as all the circumstances are before the court, I must hold the verdict of the jury should be set aside and judgment entered for the defendants.

Mr. Morison, Q. C., for plaintiffs.

Sir W. V. Whiteway (Attorney General), *Mr. Johnson, Q. C.*, and *Mr. Horwood*, for defendants.

1894, December. HON. MR. JUSTICE LITTLE.

Trespass—Interference with fishery prosecution—Bait Act—Licenses to haul herring granted under, interpretation of.

The plaintiff, who was a fisherman resident at Lamaline, in the spring of 1890 obtained from the authorities at that place a license to haul bait fishes to be sold to French fishermen who would come to the Newfoundland coast; finding that there was no demand by French fishermen, he determined to load his vessel and proceed to Halifax, N. S. Whilst in the act of loading he was interfered with by the defendant, a commissioner appointed under the Bait Act, and prevented from taking bait fishes under the license held by him, for exportation, or under any license. The plaintiff was accordingly compelled to lay up his vessel and lost the proceeds of his venture. In an action by the plaintiff for damages—

Held—The defendant was within his powers in preventing the plaintiff from exporting the bait fishes. There was an entire suspension of authority to export bait fishes in 1890.

THIS cause came on for trial in the fall term (1892) of this court and was partially heard by me with a special jury, but as the parties expressed their desire to dispense with the services of the jury and have the matter disposed of by the court, the case was accordingly proceeded without the jury.

The action was instituted for the recovery of the sum of fifteen hundred dollars, laid as damages alleged to have been suffered by and occasioned to the plaintiff in consequence or by reason of the defendant having interfered with him and obstructed and prevented him from prosecuting the herring fishery on the southern and western coast of this island in the month of April, 1890.

By the pleadings the defendant averred that he was not guilty as charged in this statement of claim, and pleaded the general issue by statute, viz., the 24th Geo. 2nd, cap. 14, sec. 8, and the 5th and 6th Vic., cap. 97, sec. 4.

And by additional pleas he further alleged that he was a special commissioner and officer acting under the provisions of the local Act 52nd Vic., cap. 6, relating to the taking and exportation of bait fishes, and was acting in the discharge of his duties as such commissioner at the time of the alleged improper interference by him with the plaintiff. Issue having been joined on these pleadings, the parties entered upon the trial, and evidence of considerable length was adduced in support of the respective contentions of the parties.

From the plaintiff's evidence, supported by that of his two sons who formed part of his fishing crew, it would appear that

he is a resident of Lamaline and is the owner and master of the schooner *Dusky Lake*, capable of carrying some six hundred barrels of herring; that for the past thirty years he has been principally engaged in carrying and supplying bait fishes to the French at St. Peters. And in the spring of the year 1890, it being generally understood that French bankers would visit or call at different harbors on our southern and western coast to purchase and secure their supplies of bait, the plaintiff determined to avail of the opportunity and to participate in the advantages and profits likely to result from such business or undertaking applied for and obtained from the collector of Customs at Lamaline a license for that purpose. This document, produced at the trial, is in the terms following, viz.:—“License to haul, catch and sell bait fishes by Newfoundland fishermen, according to the provisions of the Act passed in the 52nd year of the reign of Her present Majesty, entitled ‘An Act to amend and consolidate the laws relating to the exportation and sale of bait fishes,’ permission is hereby granted to Thomas Hann, master of the *Dusky Lake*, of Lamaline, to haul, catch and sell herring, caplin, squid, and other bait fishes, during the present fishing season. Signed, R Bond, Colonial Secretary Dated at Lamaline, this 26th day of April, A D. 1890. Signed, C. C. Pitman, sub-collector of Customs.”

Accompanying this license and attached to it is a note or memorandum in the words following: “The attention of the holder of this license is called to the following section of the Act in relation to the exportation of bait fishes, (Act 52nd Vic., cap. 6, 11th section), ‘Any person who shall sell any herring, caplin, squid, or other bait fishes, for the purpose of shipping or putting on board of any ship or vessel, for the purpose of exportation to any person not holding or producing a license under this Act, shall be liable to a fine not exceeding \$500, or to imprisonment not exceeding three months.’”

The plaintiff procured the license with the intention of confining his operations under it to the supplying of bait to the French bankers calling at Lamaline, but, finding that none of them visited that harbor or locality, he abandoned his original intention and made his arrangements to leave that place and proceed to Lawn, where he would secure or haul a cargo of herring and carry them in bulk to Halifax, to be disposed of there to the best advantage. He arrived at Lawn, which lies about twelve miles to the westward of Lamaline, and when preparing to carry out his intention to haul the herring he was boarded

by the local officer charged with the enforcement of the law in protection of the fisheries, who, on being informed by plaintiff of the object of his calling there and on inspecting his license, gave him to understand that he had a wrong license for such a purpose, and that Commissioner Sullivan (that is, the defendant) was momentarily expected to call at that harbor and would reliably inform and direct him (the plaintiff) in relation to the matter. Shortly after the defendant arrived by the government steamer *Fiona* and boarded the *Dusky Lake*. The plaintiff deposed that he fully informed defendant of his intention to haul herring and carry them in bulk to Halifax, and that defendant, after examining license, notified plaintiff that he could not be permitted to take the herring under that license for the purpose of exportation—that he should obtain another license and pay for it. The plaintiff contended he had paid for that one in paying his light dues, and would not have done so if he were then to be prevented exercising his rights and obliged to lay up his vessel.

The commissioner, as stated by plaintiff, would not permit him, however, to obtain or haul the herring under that license, and further notified that he would not be permitted to do so under any other license. The plaintiff further deposed that defendant had such means at his command to enable him to carry out his wishes and orders as rendered it futile on plaintiff's part to attempt any effort towards securing herring at that place as intended. In consequence of the prohibition and threats of defendant, plaintiff was obliged to abandon that voyage, and return to Lamaline, where he laid up his schooner for the summer. If he had been permitted to carry out his intention and the objects of the voyage, he would have been enabled to have fitted out from Halifax for the Labrador fishery, and probably made a profitable voyage, but was wholly prevented from doing so by defendants' interference with him. He could have obtained at Halifax \$3 per barrel for his herring and his schooner was capable of carrying over 600 barrels in bulk. He consequently lost all the proceeds as such a trip promised.

This then was the history of the plaintiff's cause of complaint and in its main features was supported as already stated by his own oath and that of his two sons. It was in full reliance, he swore on the sufficiency of his license that he considered he was enabled to catch, haul and take herring, at that time, on any part of the coast and to dispose of them at any place or in any manner he pleased. But he further deposed that since

then he had been informed, and now believed, there were different forms (three) or kinds of licenses, that is to say the form he had received, a second one known as a banking license, and a third form enabling the licensee to export bait.

On returning to Lamaline it appeared he made no further application to the Customs' officer for any other license or to make any report or representation in relation to the matters connected with the license that had been issued to him. But a month or two after the events referred to had happened he informed the officer at Lamaline that he had made a mistake and had given him a wrong license.

It also appeared that, before leaving Lamaline for Lawn, on the occasion referred to, he had observed public and official notices posted up relating to the terms and provisions of the Bait Act, but was not aware of their purport.

Now, on the other side, the defendant, Mr. Sullivan, deposed that on the 5th April, 1890, he was appointed a special commissioner under the Act referred to (52 Vic., c. 6) for the purpose of having its provisions observed, and of guarding and protecting the prosecution of the Bait fisheries on the southern and western parts of our coast. He was also duly appointed a preventive officer of H. M. Customs in this colony, and was at the time in question and still is an officer of the police or constabulary force of the colony. His commission and appointments were produced and put in evidence in the cause. The testimony of defendant and other witnesses, the Colonial Secretary especially, showed that by and under a proclamation issued on the 2nd April, 1890, under the great seal of the colony, and signed by his excellency the Governor, the terms and provisions of the Bait Act of 1889 were duly proclaimed and declared to be in force during the year 1890.

That copies of this proclamation were posted up at the time in the various settlements affected by the operations of the act. That the forms of the licenses to be issued under the terms of the Act were regularly prescribed by the Governor in Council, and during that year were confined and limited to three forms. These were, first the license provided to be granted to Newfoundland fishermen, free of charge, permitting the hauling or catching, and selling of bait fishes during the season of that year; and this was the form of license issued to and held by the plaintiff at the time of the alleged trespass. The second form of license was also free of charge to vessels belonging to Newfoundland, prosecuting the deep sea fishery; and third, a

license authorised to be issued to foreign fishermen or fishing vessels, such as belonged for instance (as deposed to) to the Dominion of Canada. These were the only forms used or authorised to be used and prescribed to be issued. All officers entrusted with the execution of the provisions of the Act or having authority to grant licenses thereunder were duly instructed by written notices issued from the Colonial Secretary's office on the 9th of April of that year, that licenses were so limited in character and order as stated. Up to the month of June no other kind of license was permitted to be issued, and no form of license for the exportation of bait fishes was issued or sent to officers to be issued preceding or during the season now in question, and consequently there was an entire suspension of authority to export bait fishes in that year.

The defendant's own evidence showed that in the discharge of the duties imposed on him, and by virtue of the authority vested in him under his commission and appointment, he boarded the plaintiff's vessel at Lawn in April, 1890, and was informed by him that he, the plaintiff, came there to haul a load of herring and to carry them in bulk to Halifax.

Thereupon defendant examined plaintiff's license, the one put in by him in evidence, and finding it was not one under which he was permitted to export herring as he proposed doing, he informed the plaintiff that it was of no such service to him and that he could not be permitted to take and export bait under it. Defendant deposed that he clearly informed plaintiff that under the license he held he could take bait to supply the deep sea fishing vessels that would call at our harbors for bait, also that he could not obtain a license to enable him to export or carry bait or herring from the coast to Halifax. He further inquired why the plaintiff did not go to Fortune Bay and under his license exercise his right to haul and sell bait to the bankers who were at that time there. The defendant represented that he had expected they would call at Lamaline and Lawn.

It was then deposed to that he, the defendant, used no threats, violence or force in any way but afforded the plaintiff all the information he possessed in relation to his position under the license he then held, and gave him clearly to understand that no license was issued or could be issued under their instructions by which the plaintiff would be enabled to haul herring for exportation as he intended or proposed doing at Lawn. The plaintiff was then made fully aware of the fact that his license was insufficient to enable him so to haul and export herring

for any other purpose than that prescribed by its terms, viz., for the hauling and selling of bait fishes and not for their exportation.

The defendant also deposed that he received no notice of action or the institution of the proceedings in this cause from the plaintiff or from any other party in his behalf since the occurrence of the alleged illegal or improper interference with plaintiff in May or April, 1890.

Such then, is the character of the circumstances as detailed in the evidence, upon which rest the claim for damages on the one side and the denial of any liability upon the other. And it is satisfactory to find that there is no serious conflict of testimony excepting as to the particularity or exactness of the conversation which took place between plaintiff and defendant on board the *Dusky Lake*, and, from the versions given, it may safely be concluded that defendant confined himself to the limits deposed to and in the discharge of what he regarded as his duty under his instructions and the information he possessed. emphatically, it may be, notified the plaintiff of the limited character of the license he held and the impossibility of obtaining or having issued to him any such license as would permit of his taking or hauling herring for exportation purposes. It may be that the plaintiff believed he would be acting within his rights in carrying out his intention to haul the herring for shipment to Halifax; but it does not follow that defendant committed a violation of duty in notifying him of his real position and the consequences that would result to him if he attempted to carry out his intention of hauling herring for exportation.

The plaintiff subsequently admitted that his then license was not the proper or regular one to enable him to do so. The defendant considered it necessary to warn plaintiff of the consequences that would result from any attempt made by him to haul bait for exportation, and in doing so was acting as he believed in pursuance of instructions and the orders contained in the circular issued by the government to its officials. If the defendant were informed, as he appears to have been, by the plaintiff of his intention to do that which he had no right or authority to do under the license he held, the warning given him by plaintiff was warranted and prevented a more serious interference with the plaintiff's property on the part of the defendant than is now the subject of complaint.

We find on turning to the Act that it expressly provides by

section first, "That no person shall export, or cause or procure to be exported, or assist in the exportation of, or haul, catch, take, or have in his possession, for the purpose of exportation, &c., * * * any herring, caplin, squid, or other bait fishes, from, on or near any ports of this colony * * * without a license in writing, to be granted and issued as thereafter provided." And by sub-section (d) of section two, it is provided that licenses may be granted for the purpose of authorizing a party to haul, catch, or take bait fishes for exportation.

The license obtained by the plaintiff was in the form of these prescribed and intended to be held by our fishermen to enable them to haul or catch bait fishes to be sold or disposed of to bankers frequenting our harbors for the purchase of bait. It in no way authorized or enabled the licensee to haul and export such bait fishes.

The license, as already stated, was issued under the authority of the Governor in Council in pursuance of the terms of section three and four of the Act for a breach or infringement of the provisions of the statute.

In view of the rights and the authority of the defendant and the circumstances attending the discharge of his duties on the occasion in question, I cannot discover from the facts any grounds for rendering him liable in an action of this nature. He was a public officer duly appointed to execute or superintend the execution of the provisions of an Act of the legislature protecting and enforcing great public interests, and, whilst so acting, I cannot find from the evidence that he has been guilty of excess or negligence in the discharge of the duties of his office in this particular instance, nor can I see that he was acting without the scope of his authority, or that he acted with any other motive than to fairly if strictly fulfil the letter of his instructions and within terms of the legislature regulating the service in question.

In relation to the principle of law regarded by authority as bearing on the position of persons acting under like circumstances to these surrounding a public officer on such occasions as the present, we may with good reason apply to this case the statement of the law laid down at page 261 in *Beaven on Negligence*. Where an officer has to perform an ascertained duty he has to do it subject to his liability for negligence if in any way he falls short of its efficient performance.

In connection with this proposition it is stated, where acts have been done under orders from a body vested with statutory

authority to order, and where the party enjoined is by statute bound to compliance with orders thus issued, no liability attaches to the party conforming, even though the orders issued be improvident and though there be no statutory immunity.

The ground of accountability is negligence.—*See Jones vs. Bird, 5 B. and Ald., 837; Jacobson vs. Blake, 6 M. and G., 919; Rogers vs. Regen and Datt., 13 Moore, P. C. C., 209.* I cannot, as already stated, find upon or from evidentiary facts that any case of negligence has been made out against the defendant; on the contrary, it appears beyond doubt he acted within his powers and *bona fide* in the discharge of his duties. If the orders under which he acted or the requirements of the statute were found oppressive or created injury or inconvenience to the plaintiff, it is no reason why any liability should attach to the officer having the fulfilment or execution of such orders or requirements, if he did not exceed the scope of his authority or acted negligently in enforcing a compliance with the provisions of the Act. I cannot, in passing on the facts, ascertain from the evidence that there was an abuse of authority on the part of the defendant; but on the contrary, I find that the individual facts showed that he was well acquainted with his duties and that he fairly and intelligently discharged them.

On the facts alone my judgment therefore will be in favor of the defendant. And in that case, or under such circumstances, it may not be necessary to go into the defence under the statutes upon which the other pleas of defendant rest. It is laid down that protective clauses in acts in favor of constables and officers acting in the execution of their offices, or in pursuance of particular acts of parliament are intended for the benefit of those who want to act rightly, but by mistake done wrong. But here, as the law has not been exceeded, it is obviously unnecessary to say anything beyond the observing that the defendant was entitled to the statutable notice necessary to be given in such cases as these referred to above. In support of the the principle reference may be made to *Addn. on Torts, p. 589; Booth v. Clive, 10 C. B.; Arnold v. Harrell, 9 Ex. Rep. 487; Jones v. Nichols, 2 D. & L., 425.*

I reserve the question of costs for further consideration, and in the meantime direct judgment to be entered for the defendant.

Mr. Morison, Q. C., for plaintiff.

Hon. Mr. Morris for defendant.

1895, *March*. BY THE COURT.

Vendor and purchaser—Conditions of sale—Goods at risk of vendee—Destruction of goods—Reasonable time to take delivery, what is—Recovery of money back upon failure of consideration.

The defendants sold to the plaintiffs, in March, 1892, a quantity of codfish then in the defendants' store. One of the conditions of the sale-note, which was signed by the parties, set forth that if the fish was taken delivery of in less than one month the vendee was to have the privilege of rejecting the "dunn" fish which the bulks sold would contain; nothing was said as to the time within which the delivery should take place. The total sum paid for the fish was \$11,967.75. No delivery of any part of the fish was taken till the last days of May, when about one-third was removed. In July, 1892, the defendants' premises was destroyed, and with them the undelivered portion of the fish. The plaintiffs, having brought an action against the defendants to recover back the value of the undelivered portion of the purchase,—

Held—That the plaintiffs were not entitled to recover, in that it was shown that the fish at the time of the loss was at the purchaser's risk—the vesting of the property in the purchaser was immaterial. Where the failure of consideration, i. e., the delivery of the goods, was due to the neglect of the vendee it is doubtful on this ground alone if, having paid their money, they could recover it back.

THIS action was tried in the fall term, 1893, and the verdict of the jury was taken in the form of special findings, in answer to questions put by the court. Upon these findings each of the parties has moved that judgment be entered in their favor, or, upon the part of the plaintiffs, for a new trial.

It appeared from the evidence given at the trial, that in the month of March, 1892, the defendants, through their principal, Mr. Goodfellow, sold to the plaintiffs, through Mr. John Harvey, a member of the firm, a quantity of codfish then in the defendants' store. The terms of the sale, which was preceded by the usual negotiations, were set forth in a note or memorandum, as follows:—

"Sundry bulks of codfish, estimated as containing about, say,—

1,360	quintals	Small Shore Merchantable—H. K. L. J.
45	"	Bank Merchantable—H.
660	"	Shore Madeira—J. A. B.
170	"	Bank Merchantable—M.
340	"	French Shore and Straits—F. D.
380	"	No. 1 Talqual—P.

2,955

Bulks to be taken as they are sold.

March 21, 1892.

HARVEY & Co.

\$4.05."

At the trial one side or copy of this memorandum was produced by Mr. Goodfellow written in pencil, not signed by him, but having at the foot the letters or initials "H. & Co." Mr. Goodfellow swore that at the time of the sale he gave a corresponding copy, signed by him, to the plaintiffs, and that Mr. Harvey signed or initialed the copy produced at the trial, which he, Mr. Goodfellow, had since kept.

A controversy took place at the trial, before the production of the paper, as to whether it had or had not been so signed or initialed by Mr. Harvey. He, Mr. Harvey, had quite forgotten the circumstance of having put his initials to the paper, but upon its production he admitted the fact. The terms of the sale, as set forth in the memorandum, not being in dispute, the question as to the signing or initialing by Mr. Harvey proved not to be material, except as regards the question of credit for the jury where there was a conflict of testimony dependant upon memory.

According to what appears to be, if not the usual course, at least a frequent occurrence in such transactions, the fish at the time of the sale was stored in bulks, which were respectively marked or designated by letters, each bulk containing fish of a certain quality throughout, the quantities contained in each bulk being approximately set forth in the memorandum opposite to each bulk, the estimate so made being based upon the weight at the time of the making of the bulk.

In addition to the terms set forth in the memorandum, it was shewn to have been agreed upon between the parties, verbally, that if the fish remained in the defendants' store for less than one month the plaintiffs should have the privilege of rejecting the "dunn" fish. If it remained for over one month the fish was to be delivered to the plaintiffs without throwing out the "dunn."

It was also shewn that according to the usual rule or practice in such cases, the transaction was on the basis of payment in cash or its equivalent, if by note, by adding the discount.

On the 26th March the plaintiffs, at defendant's request, gave him a note at four months for the sum of \$10,000, and on the 13th May a second note, ante-dated March 21st, for \$1,800. (The total cost of the whole lot sold, if the quantities stated in the sale note had been exactly correct, was \$11,967.75).

No delivery of any part of the fish took place till about the 29th or 30th May. On that and two subsequent days delivery of 1,110 qtls. was taken. This fish was weighed upon delivery

in the usual manner, but was not "culled"; the qualities in the several bulks having been already agreed to and determined by the stipulation in the sale note or memorandum, "bulks to be taken as they are."

In the great fire of the 8th July, 1892, the defendant's premises were destroyed, and with them the undelivered portion of the fish, the subject matter of the transaction now in question.

The plaintiffs now seek in this action to recover back from the defendants the sum of \$7,304.50, being the difference between the value of the 1,110 qtls. of fish delivered, namely, \$4,495.50 and \$11,800, the amount of the promissory notes given on account of the purchase as above stated.

In addition to the foregoing facts, which were not in dispute, there were several incidental facts and circumstances, upon which the evidence was more or less conflicting, and upon which questions of law as well as of fact arose.

As to the time or period within which the delivery of the fish should have taken place, whether such time or period was fixed by any implied agreement arising out of either (1) the well-known custom or practice of the trade in such cases; or (2) the peculiar circumstances of this particular case, there was considerable controversy. It was admitted by both parties that there was no positive agreement between them as to the exact time within which the delivery should take place, and the stipulation already referred to with regard to the "dunn" fish, showed that a possible delay of one month at least was in contemplation by both parties. With regard to the usual practice, it was proven and not seriously disputed that the delivery usually follows upon the sale, if not immediately, at least very closely, and as it appeared by the evidence generally, subject only to the delay necessarily occasioned by bad weather.

In this case the plaintiff's witnesses, particularly Mr. John Harvey, stated that the purchase was made as a speculation, that his objects or plans would be best served by allowing the fish to remain on defendant's premises till the plaintiffs could find a good market or sale for it, by which they would save the expenses of a second removal or handling, and that he had that object in view when he made the purchase. He did not, however, go so far as to say that such a plan or purpose on his part was incorporated into or involved in his bargain with the defendants; and in answer to a question bearing directly on that point he replied that "if Mr. Goodfellow asked us particularly to take it away we would have done so. We agreed to

take it when requested and when required to do so by Mr. Goodfellow; no storage was charged."

Upon this point, that is, the non-delivery of the fish up to the time of the fire, it was proven that the defendants made repeated requests of the plaintiffs to send for and take away the fish; that plaintiffs from time to time made excuses for not taking it away, and stated to defendants it was a convenience to them (plaintiffs) to have it remain in defendant's store, and that at last the taking was only begun upon an imperative demand being made by the defendants.

A strong conflict of testimony arose between Mr. Goodfellow and Mr. John Harvey in relation to a question as to an insurance said to have been effected or kept in force by Mr. Goodfellow upon the fish, while on his premises. Mr. Harvey stated that in a conversation which took place between him and Mr. Goodfellow at the Commercial Rooms, he (Mr. Harvey) asked Mr. Goodfellow if the fish was insured, and that he (Mr. Goodfellow) said that it was. He said that his object in speaking of insurance was to see if the note he had advanced upon was covered. If it had not been insured by Mr. Goodfellow he would probably have insured it. He stated that after the fire he went to see Mr. Goodfellow at the South Side, and asked him if he was collecting the insurance on the fish all right, to which Mr. Goodfellow replied, stating that there was no insurance, and denied having said that the fish was insured, to which he (Mr. Harvey) replied to the effect that he considered his (Mr. Goodfellow's) position in the matter as scarcely honorable, &c. His (Mr. Harvey's) evidence was to the effect that having made advances upon the fish, he considered that he had in some way a claim upon the insurance, or that if it had been insured, it would have been for his benefit. Mr. Goodfellow gave an entirely different version of the conversation on the subject of the insurance which took place shortly after the sale. He stated that when Mr. Harvey asked him whether the fish was insured, he replied that it was not. He says he did not generally insure fish in the store as there was little or no fear of fire. He said if there was a margin, that is, upon a policy which was then running, he would give him (Mr. Harvey) the benefit of it. He afterwards found another policy (of which he was not before aware) for \$4,000, on goods in that store upon which there was a small margin, of which he told Mr. Harvey, who said he would think over the matter before he would insure. After the fire the defendant asked the plaintiffs before settling

with the Insurance Co. whether he should make a claim on their behalf in respect of the fish, under the terms of the policy covering goods "upon trust or on commission." to which request or offer plaintiffs gave no reply.

Both parties at the trial attached great importance to this matter of the insurance, particularly the plaintiffs, who relied upon what he apparently believed to have been Mr. Goodfellow's statement that he had an insurance upon the fish as evidence to shew that the property and risk were still in the defendants. On the other hand, the defendants contended, and with much force, that even accepting the plaintiffs' version of the conversation as correct, the inference to be drawn from this, as well as from Mr. Harvey's statement that if it had not been insured by Mr. Goodfellow he (Mr. Harvey) would probably have insured it, and from his anxiety about the insurance throughout, is that he (Mr. Harvey) himself considered that the property was at his risk, and that unless the property and risk had passed to him by the sale he could have no claim upon the insurance.

This matter, however, as well as all the other facts and circumstances, was left to the jury for their full consideration, accompanied by the arguments of counsel on both sides.

At the close of the evidence and arguments the Chief Justice, who tried the case, put to the jury the following questions, to which in their verdict they returned the following answers, viz. :

Question 1—Was there a contract between the parties for the sale and purchase of 2,955 qtls. of codfish, contained in different bulks and lettered at \$4.05 per qtl., on the 21st March, 1892?

Answer—Yes.

Question 2—Were the bulks ascertained and identified, and was there an arrangement by estimate of the quantities?

Answer—Yes.

Question 3—From the contract and circumstances in evidence, what was the intention of the parties as to the vesting of the property, as regards change in ownership and dominion?

Answer—We find the intention of the parties was that the property should vest in the purchaser after a reasonable time had elapsed for its delivery—say one month.

Question 4—At whose request and at whose risk was the fish left in the stores of the defendants?

Answer—(a). At the request of the plaintiffs; (b). At the risk of the plaintiffs at the expiration of one month after the date of purchase

Question 5—What is the usage in proof as to time of removal where no time is specified in the contract?

Answer—The purchaser to remove the fish without unnecessary delay.

Question 6—By which party, if by either, was delay occasioned as regards the removal of the fish, and was there default or obstruction by the defendants to the plaintiffs (purchasers) in reference to the removal by them. Was there unreasonable delay not acquiesced in?

Answer—(a) Delay was occasioned by the plaintiffs; (b) There was no default or obstruction caused by defendants; (c) There was unreasonable delay on the part of the plaintiffs not acquiesced in by the defendants.

Question 7—Was the fish in the bulks remaining over the part delivered weighed after the contract entered into, so as to ascertain quantity?

Answer—It was not weighed.

Question 8—Was the balance of the fish so contracted for destroyed by the fire of the 8th July, 1892, while in the store of the defendants, and to what extent as estimated?

Answer—The balance of fish in defendants' store was totally destroyed by fire on July 8th, 1892.

Question 9—Have the defendants been paid for the total of the bulks, and what was the value of the undelivered part?

Answer—(a) No; (b) Estimated value \$7,472.25.

Upon the question as to whether or not, at the time of the fire which destroyed the goods, the property had or had not passed to or vested in the purchasers (the plaintiffs), the plaintiffs contended that the present case, under the evidence, must be held to come within that class of cases which may for convenience be described as being represented by the case of *Logan vs. LeMessurier*, reported in 6 *Moore's Privy Council Cases*, 116; by the well-known local case of *Ridley vs. Trustees of Estate of Steele*, and the recent case of *Murray vs. Goodridge*. All these cases were alike, in so far as that it was held or found that the sale was of an unascertained quantity, that the ascertaining of the quantity by weighing did not take place till the delivery, and that the property did not pass or vest till the delivery took place.

The defendants, on the other hand, contended that notwithstanding the principle governing the cases just referred to, if all the circumstances showed that the intention of the parties was that the property should pass to the purchaser immediately

upon the making of the contract, that intention should be held to take effect and form part of the terms of the contract. In support of that contention counsel cited several cases, of which we may refer specially to those of *Castle vs. Playford*, L. R. 7, Ex. 98, and *Martineau vs. Kitching*, L. R. 7, Q. B. 436.

In each of these cases, while recognizing the principle laid down in *Logan vs. LeMessurier* and other such cases, it was held that it would be quite competent for the parties to contract that the property should pass to the purchaser immediately upon making the contract, the ascertainment of the exact quantity and price being merely matters of subsequent adjustment between the parties, and it was contended that the facts of this case brought it within the principle just stated.

In this case, however, we have the express findings of the jury in answer to question No. 3, to the effect that the intention of the parties was that the property should vest in the purchasers (the plaintiffs) after a reasonable time had elapsed for its delivery—say one month, and the question arises whether or not the court ought to set aside the verdict on that point.

If the final determination of this case turned upon the answer to this question alone, we should probably agree with the jury in so far as they find that the circumstances of the case do not indicate an intention on the part of either of the parties that the property should absolutely pass to the purchasers immediately upon the making of the contract, without the usual preliminary of weighing; or, to put it in another form, we think that it was intended that the case came within the principle which was held to apply in *Logan vs. LeMessurier*, *Ridley vs. Steele*, *Murray vs. Goodridge &c.* As to the finding of the jury that it was intended that the property should pass to the purchasers upon the expiry of one month from the making of the contract, we give no opinion as to whether or not the evidence would sustain such a finding; inasmuch as in view of the findings of the jury upon other questions, we think that there is sufficient to enable us to dispose of the whole case.

We are of opinion that the judgment in this case should depend, not upon the question as to the vesting of the property at the time of the destruction of the goods, but upon the question: At whose risk was the property at the time? As to the facts in this case the verdict of the jury is contained in question four and answer thereto:

Question—At whose request and at whose risk was the fish left in the stores of the defendants?

Answer—At the risk of the plaintiffs at the expiration of one month after the date of purchase.

We think the finding of the jury is fully sustained by the evidence and all the circumstances of the case.

Upon this point we think that the law laid down in the cases already referred to, viz., *Castle vs. Playford* and *Martineau vs. Kitching*, must be held to govern this case.

In both of these cases the seller of the goods, which were destroyed before the delivery could take place, sued the purchaser for the value of the goods and recovered. It was held in both cases that the question as to the passing or vesting of the property to or in the purchasers at the time of the loss of the goods was immaterial, provided that the goods at the time of the loss were shewn to have been at the purchaser's risk.

The language of Mr. Justice Blackburn in the case of *Martineau vs. Kitching*, p. 455, is very clear and forcible.

It further appears from the authority of this case of *Martineau vs. Kitching* that the liability of the purchaser of goods for the loss occurring before delivery is still clearer in a case in which the non-delivery has been owing to the fault of the purchaser himself. In this case the jury have found in answer to questions five and six that under the terms of the contract the purchaser was to remove the fish without unnecessary delay, that delay was occasioned by the plaintiffs, that there was no default or obstruction caused by defendants, and that there was unreasonable delay on the part of the plaintiffs not acquiesced in by the defendants.

In the case just referred to the facts were somewhat similar, the difference being that the default on the part of the purchasers was not so clear as in the present case. In that case Mr. Justice Blackburn says (p. 456):—

“There is another reason which in this case would clearly apply, the delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day comes the sellers have a right to require that the goods should be weighed at once so as to ascertain the price and to have it paid to the last farthing. It may be for the mutual convenience of both parties; but still it is the buyer in effect who requests that as he is going to leave them longer the weighing should be postponed for a time. Therefore it is in consequence of his delay that the weighing does not take place. Now by the civil law it always was considered that if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk just as

if the *emptio* was *perfecta*. That it is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk as if the property had passed. The inclination of my opinion is, as I have said, that the property is in the purchaser, but we need not decide that at all to-day."

There is a further element in this case which would at least make it difficult for the plaintiffs to sustain their claim under the facts as found by the jury, and irrespective of their finding as to the vesting of the property, or the passing of the risk. This is an action to recover back a sum of money which has been paid by the plaintiffs, on account of a contract or transaction which has not been carried out, or in technical language, for "money had and received," upon a failure of the consideration for or upon which the money was paid. The case of *Logan v. LeMessurier*, already cited, is an authority for the general principle, which indeed is not in question, as to the right to recover back money which has been paid upon a consideration which has failed, as also for the application of that principle to the case of money paid in advance for goods which were afterwards not delivered.

But apart altogether from the question of the vesting of the property in the purchaser, in which the case of *Logan v. LeMessurier* differs from the present case, it is clear law, established by numerous authorities, that a plaintiff who seeks to recover back money which he has paid upon a consideration which has failed of realization, must show that for that failure he has been entirely free from blame. The action for "money had and received" in such cases is a sort of equitable remedy; and may be available to a party who, upon the principles of equity, "comes into court with clean hands." It is equally a well-established principle that in a case in which the failure to effect or to realize the consideration for or upon which the party has made payment or an advance, has been the result, though even partially, of default or neglect on his part, his claim to recover back the money which he has paid must fail.

In the present case the failure of consideration—that is, the delivery of the goods—has been found to have been owing entirely to the fault of the plaintiffs, who left the fish in the defendants' store for their own convenience, and for so long a time after the reasonable and proper time for the delivery and removal had passed.

If upon no other ground therefore than this, it is at least doubtful whether, having once paid their money on account of this contract or purchase, the plaintiffs can now recover it back.

Upon the whole case, therefore, we think that judgment should be entered for the defendant.

Attorney General and *Mr. Johnson* for plaintiffs.

Mr. Emerson, Q. C., and *Mr. Horwood* for defendants.

S. S. CYPHRENES v. S. S. LA FLANDRE. *

1896, June. HON. SIR F. B. T. CARTER, C. J.

Shipping—Collision—Regulations for preventing collisions at sea, Article 18.

Two steamships, on opposite courses on the Atlantic, when nearly a mile apart, sighted each other. The *Cyphrenes* was steering E. $\frac{1}{4}$ N.; the *La Flandre* W. S. W. Both ships were making full speed. Within five minutes of mutually sighting each other the ships came into collision, the *Cyphrenes* striking the *La Flandre* on the port side at an angle of 6° or 7°, and twice after on the same side before passing her stern. Beyond these facts the parties were not agreed, and the pleadings and evidence were in absolute contradiction and differed irreconcilably. The *Cyphrenes* was wrecked by the collision and abandoned by her crew. Her owners and the owners of the cargo and freight afterwards instituted proceedings, alleging that the *La Flandre* was alone to blame; the latter ship defended, and counter-claimed on the grounds that the collision was entirely due to the fault of the *Cyphrenes*.

Held—The *Cyphrenes* was alone to blame and judgment should go against her, and the counter-claim of the *La Flandre* be allowed, in that the *Cyphrenes* should, on seeing the *La Flandre's* red light, have reversed her engines full speed, have kept her helm to port and answered the international signal of the *La Flandre*, none of which regulations she observed but which were all observed by the other ship.

THIS was an action *in rem* instituted by the owners of the British steamship *Cyphrenes* against the owners of the Belgian steamship *La Flandre* to recover damages for the total loss of the former ship and of her cargo, occasioned by collision between the two ships in the North Atlantic Ocean on the 30th December, 1893.

The defendants counter-claimed.

* The defendants in this case appealed to the Privy Council, where the judgment of the Chief Justice was affirmed. For judgment of Privy Council *vide* Appendix, page 19.

The facts alleged on behalf of the plaintiffs were that, on the 30th December, 1893, the steamship *Cyphrenes*, of 1,309 tons register, manned with a crew of twenty-seven hands, was proceeding on a voyage from Savannah, in Georgia, United States of America, bound to Liverpool, with a cargo consisting of bales of cotton and other merchandize, and that shortly after 6 a. m. on said day the said steamship was in latitude about 45° 26' north and longitude about 49° 14' west, steering east $\frac{1}{4}$ north by her standard compass, and proceeding at the rate of nine miles an hour with a slight breeze of wind from the southward and weather clear. She had no sails set; the masthead and side lights were duly exhibited and burning brightly, and a good look-out kept. At that time the masthead and starboard lights of a steamer were observed, which proved to be the *La Flandre*, about three-quarters of a mile distant, bearing three and a half or four points on the *Cyphrenes'* starboard bow. The *Cyphrenes* kept on her course, when shortly afterwards the *La Flandre* opened her red light, causing risk of collision. The helm of the *Cyphrenes* was put immediately hard-a-port and engines put full speed astern, but the *La Flandre* came into collision with her, striking with her port side the stem and bows of the *Cyphrenes* and carrying away and staving in the same beyond the water-tight bulkhead. After consultation, the water having got into the engine room, and as there was no possibility of saving the stricken ship, and as from her position she was likely to become a dangerous obstacle to navigation, the master set fire to her, when she shortly afterwards sank.

The facts as alleged by the defendants were: that the *La Flandre* was a Belgian screw steamship of about 1,510 tons register, constructed for the carriage of oil, with a crew of twenty-nine hands, and was on a voyage in water-ballast from Antwerp, Belgium, bound to New York, United States of America, there to load with petroleum for Europe. That on the said 30th December, about 6.25 a. m., the ship was about 179 miles off Cape Race in latitude 45° 38' north and longitude 49° west, the morning dark and rainy with a fresh breeze from about N. W. and sea moderate. The *La Flandre* was under steam alone, steering W. S. W., true course, and making about seven knots an hour. The masthead and side lights were duly exhibited and burning brightly, and a good look-out kept. At that time was sighted a masthead light of a steamship (which proved to be the *Cyphrenes*) right ahead, distant apparently

from one to one and a half miles. Those on board the *La Flandre* immediately afterwards sighted, together with the masthead light, the red light of the *Cyphrenes*, also right ahead. The *La Flandre*, immediately upon seeing the red light of the *Cyphrenes*, which caused risk of collision, ported her helm, and shortly afterwards she saw both side lights, together with the masthead lights of the *Cyphrenes*, the helm of the *La Flandre* being still constantly kept a-port. The red light of the *Cyphrenes* shortly afterwards disappeared, and the *La Flandre* saw only her masthead light and her green side light. Not seeing the red light of the *Cyphrenes* re-appearing, the *La Flandre* then gave the international signals with the steam whistle that she was directing her course to starboard. These signals were not regarded or answered. In the meantime, although the rudder of the *La Flandre* was hard-a-port and she was constantly going off to starboard, the two ships were getting so close to each other that collision became imminent. The *La Flandre* stopped and immediately reversed her engines full speed astern. Nevertheless, the *Cyphrenes* struck the *La Flandre* on her port side between the foremast and forestem, doing her considerable damage, and instantly afterwards struck her in several places between the place of the first collision and the stem of the *La Flandre*, thus occasioning much more damage. The plaintiffs charged that the *La Flandre* should have kept her course, that her helm was improperly ported, and that the collision was occasioned by her improper and negligent action.—The defendants charged that the collision was caused by the improper and negligent navigation of the *Cyphrenes* in not keeping her course, in improperly starboarding her helm in the first instance, and afterwards improperly porting her helm at so short a distance from the *La Flandre* as to make a collision between the ships inevitable, in not reversing the engines and in disregarding the international signals given by the *La Flandre*.

The witnesses on both sides were examined before me in court and, as not infrequently happens in like cases, the evidence of the respective crews of the ships concerned was so conflicting in material points as to be irreconcilable. There is little difference in the testimony as to the position of the ships in the Atlantic when first seen by each other, but the parties do not quite concur as to the state of the weather or the direction of the wind at the time. The plaintiffs stated that the weather was clear but dark, and on cross-examination, Owens,

the second officer or mate of the *Cyphrenes*, also stated "there was a kind of mist, spitting rain," the wind southerly, while the defendants stated that it was north-west with drizzling rain, and that they could not see far. Both say it was not foggy and that the sea was moderate. Owens, who had been in charge from four o'clock, a. m., of the 30th December, when the collision occurred, stated that "twelve minutes past six o'clock I sighted the masthead light and green light of a steamer (the *La Flandre*). These lights bore between three to four points on our starboard bow at a distance, I should say, of between three quarters and one mile off. Nothing was done when I saw his green light. About two minutes afterwards I saw his red light, which bore about five points on our starboard bow. When I saw the red light I immediately sang out to put the helm hard a-port. That was followed immediately after by ringing the telegraph "full speed astern." These orders were obeyed. The red light approached us quickly, and was opening more and showing her hull now as she came on, coming at considerable speed. From the time I first saw her red light until the collision I should say was four minutes. We never starboarded our helm. It was not possible up to the moment of collision for the *La Flandre* to have seen our port light at any time. From the time I gave the order the engines were going astern all the time. After the collision the *La Flandre* had headway on her and struck us several times going along before she got clear of us. I should say the *La Flandre* was coming on at seven or eight knots at the time I saw her red light. I heard one short blast of her whistle just immediately before the collision. The *La Flandre* was going ahead at this time. When she blew the whistle she was then almost right on top of us or on our starboard bow." This was the officer from whose notes the entries in the official log were made by the first officer, to which I shall hereafter refer. The master, Schmuck, and second officer Herman of the *La Flandre*, who were together on the bridge from four o'clock, a. m., on the day and time in question, corroborated each other. The master had continued there from the previous watch, and he stated the condition of things during that time on board his ship, before sighting the *Cyphrenes*. He stated, *inter alia*, "that a bright masthead light was reported by the lookout about twenty-five minutes past six o'clock. The lookout was situate on the top-gallant forecastle. The man on the lookout is an A. B., and had a master's certificate. From the bridge where I saw the

masthead light before it was reported by the lookout. I saw it a couple of seconds before it was reported. My sight is good—it has been proved so a couple of times. After the masthead light was reported, a couple of seconds after, the red side light was reported. I saw the red light at the time it was reported. That light was reported right ahead, and the masthead light was reported right ahead. When they were reported right ahead I saw them right ahead. At the time these lights were reported I was on my course W. S. W., true course. As soon as the red light was reported I ordered the helm hard a-port. As soon as it was reported I saw it and gave the order to put the helm hard a-port. That order was instantly obeyed. I gave that order. I don't think it was repeated by the second officer, because I saw him going to the wheel house. I heard the wheelman say "harda-port." The upper wheel house is on the bridge where I was. After I gave the order hard a-port I heard the response hard a-port, and then I saw the three lights right ahead. It may have been three or four seconds after I saw the red light that I saw the green light. In the space that intervened between seeing the red light and seeing the green light I had given the order hard a-port. At the time I saw the green light the vessel had answered her helm. The ship had only changed her course a little. We gave her so much helm in a second or two that she changed her course immediately. When I saw the green light I saw the red and masthead light. All the three lights were in view; I watched those lights carefully. Then the red light disappeared, leaving only the masthead light and the green light. I still continued porting hard a-port, going off to starboard. The green and masthead lights still kept in view. After the red light disappeared I saw only the masthead light and the green light of the other vessel. The other vessel must have starboarded naturally; I mean she starboarded naturally because the red light went out of sight. That was the natural conclusion I came to. I continued going off to the starboard with the helm hard a-port. My vessel has no keel and has a flat bottom. This has the effect of turning quicker and of answering the helm instantly. She has steam steering gear so that you can turn it round instantly with your finger. The steering gear being so easily managed and the vessel being without a keel she can be brought round more quickly than a vessel with a keel. I continued the vessel hard a-port and I saw next from my judgment it was about time to stop the ship and reverse the engines, as I saw the other vessel was coming

closer. About a minute or so after I saw the three lights and the red light disappear. I blew the international signal, which was one short blast. This was the signal that I was directing my course to starboard. After looking for the red light and not seeing it again appear I blew a second blast. The second mate gave the signal and there was about eight or nine seconds between the blasts. The blasts were as loud as the whistle could go. It was a loud whistle, and ought to be heard with weather like that a mile, anyhow. I heard no reply; then I whistled a third time as there was no reply. After I blew the third whistle and there was no response, I put the telegraph "full speed astern." I got a reply to the telegraph instantly. The engines were put full speed astern. About two minutes elapsed between my giving the order "full speed astern" and the collision. All this time the helm was hard a-port. When I put my engines full speed astern the *Cyphrenes* bore from me from $4\frac{1}{2}$ to 5 points on my port bow. I went full speed astern to allow her on her course to cross our bow. Then I saw from the *Cyphrenes'* masthead light and the green side light that instead of going off on her course she must have ported. She ran into my port side at an angle of about seven points from my bow or stem on my port bow. This shows she must have ported her helm and was going at a great speed. All this time I was on the bridge and the second officer was on the bridge just the same. There was a man at the wheel and there was a man on the look-out. At the time of the collision it was still dark. There was no moon and there was no daylight. Daylight had not come when she ran into us. I could not see the hull of the *Cyphrenes*; I could see the loom of her. Up to the time of the collision my engines were full speed astern. From the loom of the ship I could see that she was coming into us at a considerable speed. I could not tell the exact speed; it was about eight or nine knots. I mean she was going eight or nine knots. She went into us about seven points on our port, the beam would be eight points. When she went into us I could feel she struck us very much. I could feel our ship going over to starboard very much. My vessel had heeled over to starboard so much that I thought my vessel would be capsized. I was in water-ballast. I heard a loud crashing as she went into us forward. When she hit us I stayed on the bridge.—After she hit us I saw her as she came away from us. I kept my eye on her. She came out of the hole instantly and went back from my ship some ten or twelve feet, and then she struck

me again aft about twenty feet from the first hole, and broke the top plate and rail. She never got clear of my side until she got clear of my stern, and gave me another heavy blow aft of the mizzen rigging. Before the collision and before she touched me at all I sung out, "What are you doing man, go astern?" I sung this out twice; there was no reply; then the collision occurred. After the collision I again sung out, "Go astern, stop your engines, you are tearing my whole side out!" The reply from the *Cyphrenes* was, "She is stopped." I think it was Captain Kelly's voice; she passed my stern and passed me altogether. She went around my stern and came up until she laid up about five or six points on my starboard bow, about a quarter of a mile away or a little less."

I have not extracted the evidence of the master of the *Cyphrenes*, as he was not on deck until some time after the ships had sighted each other, having retired at twenty-five minutes after five to the chart room, lying down on the settee. The two I have selected ought, with the second officer of the *La Flandre*, if they have spoken truth, fully testify to the circumstances surrounding the collision. And yet they and those who have given their evidence on each side so strongly contradicted each other that I have had no little difficulty in arriving at the judgment I should pronounce, particularly as regards any improper manœuvering under the circumstances by the *La Flandre*, which may be considered to have contributed to the collision. I have carefully considered the evidence of the master of the *Cyphrenes*, as also that of the second officer (Hermann) of the *La Flandre*, who was on the bridge with the master throughout, from whose notes the entries in the official log were made, as also the evidence of those who were on watch. And here, as regards the efficiency of the lookout on board the *Cyphrenes*, I may observe, upon the absence of the third mate, whose duty it was, as the second mate stated, to have been on the forward house but who was not there, as was also the case of Sullivan, who should have been there but was not, and who was permitted to leave this colony without being examined. Where the conflict in testimony is so great, very much depends upon the reliance to be placed on the accuracy of the evidence of Owens, the second mate of the *Cyphrenes*, whose statement of the time at which he first sighted the masthead light of the *La Flandre* varies from eight minutes after six o'clock, the time he gave the first mate for entering in the official log, and twelve or thirteen minutes after six o'clock, which he now states is

more correct than the other which was given on the day of the collision on board the *La Flandre*, and which he did not discover until some time had elapsed after his arrival in Saint John's. He further stated that he wished to make another correction, that he saw the green light of the *La Flandre* about two minutes before he saw the red light, "whereas in my statement put in the log I made it five minutes." Considering the short time that elapsed between the sighting of the ships and their distances from each other and the time of the collision, it is remarkable there should be such a variance between these times, when the circumstances must be presumed to have been so fresh in the recollection of this witness, and his subsequent rather tardy discovery of his previous inaccuracy. If his first statement were true, as entered in the log, then, instead of two minutes having elapsed from his seeing the red light after he had seen the masthead and green lights, five minutes would have elapsed before he gave the order hard a-port, and rung the telegraph bell to reverse full speed astern. On cross-examination, he admitted that if they had continued their course five minutes after seeing the green light there would have been no collision. The promptitude with which these orders were obeyed is of consequence. The only person attending to the engine at the time was the second engineer, Jones, and several of the crew of the *La Flandre* have deposed that he stated when on board her that when the telegraph bell rung to reverse he was on the top of the platform greasing the cylinder, and in hurriedly going down the ladder he had his waistcoat or coat torn. This, however, he positively denied. Among the many contradictions in the respective statements the plaintiff asserted that the *La Flandre* struck with her port side the stem and bow of the *Cyphrenes*, carrying away and staving in the same beyond the watertight bulkhead; that she continued going ahead and steamed across the *Cyphrenes'* bow and circled on her port helm until she brought herself on the *Cyphrenes'* starboard side; while the defendant asserted that the *Cyphrenes* struck the *La Flandre* on the port side at an angle of about seven points from her bow or stem on her port bow and with so much force that she heeled over to starboard; that she again struck about twenty feet from the first hole and never got clear of the *La Flandre's* side until she got clear of her stern and gave her another blow aft of the mizzen rigging; went round the *La Flandre's* stern and came up until she laid about five or six points on the starboard bow of the latter, distant about a quarter of a mile.

The mechanical experts, Wheatly and Ledingham, have described the construction of the *La Flandre* and the character of the damage as illustrated by the photographs, and both state that, from their observations and considerations, the *Cyphrenes* ran into the *La Flandre* some seven or eight feet at the strongest part of her side with great resisting powers, and that her force must have been considerable to have caused such destruction and the destruction of her (*Cyphrenes*) own structure at the same time. I think it is due to the master and crew of the *La Flandre*, they being all of foreign birth, to say that they appeared to me to give their evidence very fairly and with the desire to speak truthfully, including the two of them (Nuits and Lindhout) who were produced by the plaintiff when they were about quitting the ship under the circumstances given in evidence. It was a serious disadvantage to me that at the hearing competent nautical assessors could not be obtained here, but, after considerable delay, the parties selected two of known competency and experience, who, having most carefully read over and considered the evidence, plans and exhibits, gave the result of their considerations as follows:—"We find that when the *Cyphrenes* first saw the *La Flandre's* lights, about one mile distant, the *Cyphrenes'* helm was ordered to port, and we are of opinion that if it had been so kept and the international signal given by the *La Flandre* that she was directing her course to starboard answered, that no collision would have occurred; also, that when the *Cyphrenes* saw the *La Flandre's* red light and the ships nearing each other the engines of the *Cyphrenes* should have been reversed full speed, by which measure the ships could not have collided in the manner they did, and in our opinion both would have passed clear of each other.

"We find that when the *La Flandre* first saw the masthead light of the *Cyphrenes* and shortly afterwards the red light, she at once had her helm put to port and so kept it, and gave the international signal mentioned above, that she had so done which the *Cyphrenes* neglected to answer, but should have so done or have given another signal under the circumstances; for instance, if the *Cyphrenes'* helm was to starboard when she heard the *La Flandre's* signal, she should have given two short blasts to warn the other ship it was so. However, when the *La Flandre* lost sight of the red light of the *Cyphrenes*, while still seeing her masthead and green lights, assuming the *Cyphrenes* was under a little starboard helm, the *La Flandre* should have at once reversed engines full speed, which might have

avoided the collision, or it would have been less disastrous than it was, as regards the speed of either at the time of the collision beyond the fact that both were seriously damaged, and that both or one of them must have been going at nearly if not at full speed. Admittedly, from the evidence, the ships were steering on nearly opposite points or within half a point of it. From the evidence on behalf of the *Cyphrenes*, it appears that when the *La Flandre's* lights were first visible they bore three and a half to four points on her starboard bow about three-fourths off, or a mile distant. In which case if both ships had maintained their respective courses they would have passed each other about half a mile in distance, and could not possibly have collided. On the other hand, the evidence for the *La Flandre* shows that she first saw the *Cyphrenes'* lights right ahead about one and a quarter miles distant, and that she at once ported her helm; in which case, and if that the *Cyphrenes* had kept on her course, no collision could have taken place, as the *La Flandre*, being quick to answer her helm, would have been well clear of the other before they met.

"The foregoing is the conscientious opinion of both of us to the best of our knowledge and experience, and we think that the fault, if any, was on the part of the *Cyphrenes*."

They were also of opinion that one man was not sufficient for attendance at the engines. The probability is that if both ships had not seen each other and maintained their respective courses there would have been no collision. There was no fog, but it was dark, with a little rain, and wind moderate when the lights of the ships appeared right ahead of each other. It appears that the master of the *La Flandre* gave the proper order to hard a-port when the masthead and green lights of the *Cyphrenes* were visible, as also at first did the latter, but when her red light so shortly afterwards disappeared and did not reappear, as I consider the evidence warrants me in believing, the *Cyphrenes* must have indicated a starboarding. Finding the red light kept out of sight the master of the *La Flandre* gave a short blast of the whistle to signify that she was directing her course to starboard. This was repeated twice at short intervals. These signals being disregarded (one only is admitted to have been heard just before the collision) she was put full speed astern to allow the *Cyphrenes* to cross her bow. About two minutes afterwards the collision occurred; and, according to my view of the evidence, was caused by the *Cyphrenes* with great force running into the port side of the *La*

Flandre. The only fault attributed to the latter by the assessors was their thinking she should have reversed her engines before she did to prevent or lessen the effect of collision; but it was observed in *Wilson & Sons vs. Currie*, 6 Rep. H. L., 1894, that of course must always depend upon the circumstances of the particular case, and, substituting the *Otto* and *Thorse* in that case for the *Cyphrenes* and the *La Flandre* in this case. I may inquire had not the *La Flandre* a right to see with reasonable certainty before reversing whether the officer in charge of the *Cyphrenes* was going to manœuvre as he ought to have done? And, as in the *Beryl*, 5 Asp M. C., 325, had he not the right to assume that the *Cyphrenes* would not go on obstinately neglecting her duty? After the signals were unanswered it was apparent to the master of the *La Flandre* that the officer in charge of the *Cyphrenes* was persisting in manœuvring as he ought not to have done. He stopped and reversed. The assessors concluded that the fault, if any, was on the part of the *Cyphrenes*.

Having regard to the regulations for preventing collisions at sea and all the circumstances as given in evidence before me, I am of opinion that the *La Flandre* was not improperly manœuvred, and that the *Cyphrenes* was alone to blame for the collision and consequent damage; and I therefore give judgment against the owners of the *Cyphrenes* (the plaintiffs) and allow the *La Flandre's* counter-claim with costs.

From the large amount claimed on both sides and the important principle involved in this action, I am much pleased to be informed that my decision is to be appealed from to Her Majesty's Privy Council, which high tribunal has so much larger experience in like matters than we can pretend to have here.

Mr. Morison, Q. C., for *Cyphrenes*.

Mr. Emerson, Q. C., and *Mr. Horwood, Q. C.*, for *La Flandre*.

1896, July. HON. MR. JUSTICE LITTLE.

Delinque—Debenture bonds—Assignment as cover for advances—Continuing security—Non-registration—Non-delivery—Power of Bank to assign—Insolvency of Bank.

In the year 1886 the Commercial Bank of Newfoundland by deeds assigned to the London and Westminster Bank, London, certain debenture bonds to the value of \$144,100, as security against advances to be made on current account, to be held so long as any amount remained due to the London and Westminster Bank. The bonds so assigned were held by the assignors for the purpose of collecting the annual interest due on the same. In 1892 the indebtedness of the Commercial Bank was completely paid off, but the bonds were not re-assigned and further advances were made, and, on the suspension of the Commercial Bank in 1894, it was in debt to the London and Westminster Bank in excess of the value of the bonds assigned. In an action of *delinque* by the London and Westminster Bank it was contended by the trustees of the Commercial Bank, (a). That the assignment of the bonds was *ultra vires*; (b). That the assignment was incomplete as there was no delivery of the bonds and the assignment was not registered; (c). That when the indebtedness for which the bonds were assigned was paid off, the bonds passed to the assignors by operation of law.

Held—That the manager and directors of the Commercial Bank had acted within their powers in assigning the bonds; that the registration law for deeds does not apply to such securities or choses in action; that the bonds were assigned as security for all future advances; that the manual delivery of the bonds was not necessary to perfect their transfer.

THE matters in controversy in this cause are brought before us, on appeal from a judgment recently delivered by Mr. Justice Winter, upon the hearing and trial of the case before him without a jury.

In the statement of claim on the record it is alleged the defendants wrongfully hold and detained from the plaintiff company certain debenture bonds or certificates of the government of this colony belonging to the plaintiffs as assignees under assignments from the Commercial Bank, bearing date the 26th October, 1886, the 16th October, 1888, and the 10th day of December, 1889. The debentures are enumerated in the assignments and their face value is stated to be \$144,100. The defendant trustees still retain these debentures, and allege in their pleading that they were not the property of the plaintiff bank at the time of the institution of these proceedings.

Substantially the facts are undisputed, but, from a certain standpoint, they would appear to involve some questions of law seemingly difficult of solution and seriously altering the position and rights of the parties to the cause. Briefly stated then,

it appears that for some length of time prior to the year 1885 the Commercial Bank of this place had had business transactions to very large amounts with the plaintiff bank, and fully availed of the extended banking facilities afforded it by that bank. The condition of the accounts and the increasing amount of the acceptances on account of the Commercial rendered it necessary for the London and Westminster to call for additional security to that already in their hands from the defendant bank, to cover not only large existing indebtedness to them, but also to secure them in the amount of future liabilities that might be assumed for and on account of the Commercial Bank. From the correspondence and other written data to which reference was made by counsel the extent and importance of the transactions may be easily ascertained; and the insistence of the plaintiff bank in calling for additional security to cover amount of overdrafts can be fully appreciated.

Without, however, passing into the details of these, it is sufficient for the purposes of this adjudication to state that the assignments of government debentures were called for and made, and it was mutually agreed they were to be held by the London and Westminster as part cover for the amounts of advances to be made on account of the Commercial. These assignments are all substantially of the tenor and effect set out in the following copy, and are signed by manager Cooke, bear the corporate seal of the bank and dated respectively in the order stated :—

“Know all men, etc., in consideration of the London and Westminster Bank permitting the Commercial Bank, etc., to overdraw on current account in the future as in the past, the said Commercial Bank doth hereby assign, transfer and set over unto W. Astle and H. F. Billingham, Managers of the said bank, all those sixty-four Newfoundland government debentures particularly described and numbered in the annexed schedule, etc.; to hold the said bonds and all the right, title and interest of the said Commercial Bank therein, etc., unto the said managers as security for the repayment by the said Commercial Bank to the said bank of *all future* advances on the said current account, and to hold only so long as there remain monies due by the said Commercial Bank to the said London and Westminster, and not otherwise secured.”

The schedule is certified by the directors, sets out the numbers, the gross amount (\$72,100) of the debentures and declares that a copy of the assignment to the London and Westminster Bank of these debentures for the purpose of cover of overdraft had been placed with the bonds in the vaults of the bank, &c., and a memorandum made thereof in the minute book. The

debentures enumerated as transferred were not transmitted or enclosed to the London and Westminster for the reason stated in the letter in evidence from the Commercial Bank, namely, "that it was necessary, in the collection of the interest from the government, they should be presented at the office of the Receiver General." The debentures consequently remained with the Commercial Bank, and the interest was regularly collected thereon and entered in the general interest account of the bank. Under another assignment, to cover existing indebtedness and future advances, other securities were transferred and remitted by the Commercial to the London and Westminster upon precisely similar conditions as are contained in the foregoing assignment. Following on these assignments successively the banking transactions and dealings continued to be carried on between the parties with the usual alternating conditions of accounts, to which particular reference is made in a few letters supplied in evidence out of many that must have passed between the parties on this subject. In one of these from the London and Westminster, under date the 13th Feb., 1890, the manager, after acknowledging receipt of a remittance, states that the advices accompanying it exceed it by £10,000. in addition to an uncovered debit balance against the Commercial Bank of £20,000. Whilst, on the other hand, in the course of these continued dealings it appears that the indebtedness of the Commercial Bank, at the end of the year 1892, was completely wiped out.

This exceptional change at that period does not appear to have created any stoppage or even temporary break in their banking relations. There was no disturbance, practically, brought about in the business conditions existing between them by reason or on account of this unusual state of the account. Further transactions were carried on as theretofore, between them down to a short time preceding the suspension of business on the part of the Commercial Bank. When this event occurred the Commercial was found to owe the London and Westminster Bank about the sum of \$76,000 on current account; and the debentures still remained in the vaults of the Commercial Bank, with the assignments and schedules, unaltered.

Now, under these conditions and circumstances, the defendants, in support of their claim to retain the debentures, contend that the manager and directors of the Commercial Bank had no power, under the bank's charter, to make such assign-

ments; moreover, that they were not executed by the Commercial Bank nor registered in accordance with the law providing for the registration of deeds.

Reliance is placed on the insolvency of the Commercial Bank, and the vesting of its assets in the hands of the trustees on the 10th day of December last. It is also alleged that the overdrafts or advances made by the plaintiff, and which were intended to be covered by the assignments, were met and paid off by the Commercial Bank, and that the debentures thereupon passed to the defendants by operation of law; and they lastly aver that the securities were never delivered to the plaintiff, and the conveyances thereof remain incomplete and imperfect. As to the first exception taken to the claim we have to turn to the Act of Incorporation passed by the Legislature in the year 1858, instituting and giving corporate existence to the Commercial Bank.

In the 2nd section of the act the bank is declared to be a body corporate with power to carry on the "business of banking in all its branches, etc.; to take and hold, grant and assign, etc., lands, goods and chattels, etc., and to do, perform, and execute, all such other matters and things as shall pertain to it as such corporation to do and perform." By the 5th section it is provided that the corporation shall not deal in anything except bills of exchange, promissory notes, bonds, *debentures*, gold, &c., &c.

By the 3rd section it is further enacted that "the bank shall be managed by a board consisting of a manager and five directors. These directors are empowered to elect the manager, &c., and generally to transact the business of the bank."

The power and authority thus expressly conferred "to carry on the business of banking in all its branches," and to the directors "to transact all the business of the bank," would be amply sufficient to authorize and enable the directors to deal with these "debentures" in the interest of the bank as presented in this case. It appears to be a transaction indispensable, under the circumstances, to the honoring or negotiation of their foreign bills or drafts, and especially for the accommodation and benefit of certain parties who were then considered to be the most profitable and reliable patrons and customers of the bank.

If the charter were silent in relation to the right of the bank to exercise such authority, or to deal at all in debentures, or such securities for money, would not the exercise of such a

right be regarded in principle, and under the law, applicable to the management of the business of such an institution, as one of these powers inherent in the directorate, and which might legitimately be exercised by them in the interests of the bank? Or if this were a case purely of the borrowing of money for the purposes of their own business, instead of the opening of an account with the plaintiff bank to facilitate the making of remittances and the negotiation of the paper of the Commercial Bank abroad, would the directors, by such borrowing, be open to the charge of acting *ultra vires*? It could not reasonably be held that they were not acting within their powers.

We find, in *Lindley on Companies*, a recognition of the existence of this principle. He lays it down, unqualifiedly, "that a power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it." Many references might be made to reported cases containing judicial recognition of this principle, and in which parties desirous of evading their contractual liability, or voiding an agreement otherwise valid, and involving like obligations to the present, set up the plea or averment that the act or the thing done by which the obligation was created or incurred, was *ultra vires*, or in excess of the power or authority conferred on the party or parties to the agreement. In this connection brief reference may be made to the case of *The Royal British Bank* against *Turquand et al.*, 5 *Ellis and Bin.*, p. 248. The plaintiff sued defendant, a joint and stock company, on a bond signed by two directors under the seal of the company, whereby the company acknowledged themselves bound to the plaintiff in £2,000. The plea set out the condition which was to secure the bank in the re-payment of such amount as the company might owe on current account.

It was pleaded that by its charter the directors of the bank might borrow on bond such monies as would by a general resolution be authorized, but it was averred there was no such resolution authorizing the making of the bond. Lord Campbell, C. J., in delivering judgment, observed, *inter alia*, "the plea made no charge of fraud against the plaintiffs; it alleges the directors exceeded their authority in executing the bond, but omits to state that this was known to the plaintiffs, but looking to the business to be carried on by the company it might well be presumed that opening such an account and carrying on such dealings with a banking house * * would be within the authority of the directors and for the benefit of shareholders.

A mere excess of authority by the directors, we think, of itself, would not amount to a defence. * * * If no illegality is shown as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders * * * The plaintiffs have *bona fide* advanced their money for the use of the company, giving credit to the representations of the directors that they had authority to execute the deed, and the money which they advanced * * * must be taken to have been applied in the business of the company and for the benefit of the shareholders." It is unnecessary to point out the application of these authoritative dicta to the position of the parties and the question at issue in these proceedings. In view of the circumstances and facts, and of the terms of the charter or act of incorporation, and under judicial rulings on the subject, it is obvious, that in making these assignments the manager and directors acted within their power and authority on behalf of the bank.

This act of assignment was not then *ultra vires* the company, and being under the corporate seal, and for some years having been acted on and practically ratified, must be held to be the act and deed of the corporation. Then as to the exception taken to its completeness and efficacy for want of registration, we have also to hold that this contention of the defendants is equally untenable. The debentures, or government bonds, are transferable either by endorsement, delivery, or assignment, and our statute law providing for the registration of deeds has no application to such chattle interests or choses in action.

In the judgment of this court delivered in the case of *Browning, trustee of O'Deady's insolvent estate vs. McLoughlan*, the chief justice laid it down, as clear law, that the registration act never was intended to apply to the species of chattle interest denominated choses or things in action. such as shares in a joint stock, or incorporated company. It might be added that in contradistinction to the obvious necessity for the registration of a deed affecting title to interests in lands, goods, furniture, and such like, there can be no reason or necessity requiring such a registration of a certificate or debenture bond for indebtedness for money invested in the funds of the government, or stock of a company, particularly when the right to these investments may be secured by indorsation, handing over, or written assignment on the scrip or debenture, which is merely an instrument of title, to an incorporeal right.

The insolvency of the corporation, and the appointment of trustees or liquidators, do not void or affect the validity of these assignments. The defendant's rights under such circumstances are no more or less than those of the bank itself, and the debentures in question are admittedly held by it subject to such rights and claims as may be established by the plaintiff bank in these proceedings.

The defendants further allege in their exceptions, that the overdrafts for which these securities were assigned were paid by the Commercial Bank, as shown by the condition of their accounts in December, 1892, and that thereupon these debentures passed to defendants by operation of law.

Now, on reference to the language of the assignments, as above set out, it will be found to be sufficiently and clearly agreed upon, that the security is given in consideration of the Commercial Bank being permitted to overdraw on current account "in the future as in the past, and as security for all future advances."

The defendants, however, as against the clear interpretation of language so express, point to the subsequent words in the assignment, namely, that the security was only to be held so long as there remained any monies due to the London and Westminster by the Commercial, as governing the preceding terms. They argue that by force of this condition, when in December, 1892, the state of the accounts of the parties showed no existing indebtedness by the Commercial, the assignments thereupon became void, all right and claim reverted to the bank, in and to the debentures so assigned.

This certainly would have been the result following on such state of their dealings, if the Commercial had then taken any practical step towards such an end. If they had, when this exceptional condition of their relations with the plaintiffs occurred, demanded a cancelling of the assignments or notified their intention to alter the conditions of their dealings and securities, then, under the circumstances, the London and Westminster would have had no grounds, at that time, to warrant a retention of these debentures.

The dealings, however, were not closed or changed, but were continued "as in the past," and the present indebtedness of the Commercial to the plaintiff is the result of the further advances made by the latter on the strength, it must be presumed, of the agreement and understanding theretofore entered into by the banks. Furthermore, it is not credible that the plain-

tiff bank would have "permitted" any further advances to have been made if there existed any doubt of their right to retain the securities as part cover for such advances.

And the Commercial Bank directors in like manner must have relied on the continuing character of the pledge of their debentures to warrant their drawing so largely and freely on the plaintiff bank.

The proposition or contention, therefore, of the defendants on this point is somewhat specious, and cannot, at the termination of the dealings of these banks, under the circumstances, be upheld on any justifiable grounds.

We have then to refer to the other ground of exception, viz., that actual manual delivery of the debenture certificates was necessary to perfect their transfer.

But this contention is found to be also equally untenable. The doctrine on this subject is well determined, and we find that in general every transfer by assignment of incorporeal chattels, whether by deed, by writing not under seal, or even by delivery of the muniment or voucher, with mere words of parol, the transfer will be upheld in law as well as equity. The principle must be applied in this instance and leaves no room for cavil, more especially in view of the particular facts connected with these assignments.

The whole question of right in the plaintiff bank in these proceedings is, then, found to depend on a mere principle of justice. And it is manifest that although they were not bound, under the circumstances, to make advances to the Commercial to such an amount as is now due, having done so on the strength of these assignments and acted throughout in such good faith, they are clearly entitled to these securities and to apply the proceeds thereof towards wiping out of the indebtedness of the Commercial Bank to them.

The judgment appealed from is therefore affirmed, and the appeal dismissed with the cost of defendant thereon.

Mr. Horwood, Q. C., and Mr. Clift for plaintiff Bank.

Sir W. V. Whiteway and Mr. Morris, Q. C., for defendants.

1896, *September*. HON. MR. JUSTICE WINTER.

Union Bank of Newfoundland—Contributories—Winding up Act of 1896.

The receivers and liquidators of the Union Bank of Newfoundland have no authority under the Winding up (Union Bank) Act of 1895 to enforce payment of claims under section five of the "Act to amend the Act of Incorporation of 1855," against the shareholders as "contributories," and the Court has no jurisdiction to settle the list.

The facts and arguments appear sufficiently from the judgment.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.]

THIS matter comes up on an application by the receiver and liquidators of the Union Bank of Newfoundland to settle the list of contributories.

Various questions relating to procedure have been raised and by various methods in these proceedings, but these questions I shall not discuss or decide, they being, as I think, involved or merged in the main and substantial question upon which all parties are desirous of having an adjudication, viz., the liabilities of the parties who are sought to be made or held to be "contributories" in the present proceedings.

The facts are very few and are not in dispute. The Act of Incorporation of the Bank (1854) and the amending Act (1855) are in evidence, and the fact is therein stated that the shares in the company are fully paid up. It is further admitted that the several parties who have appeared in these proceedings, and who may for convenience be called the defendants, are (or were) shareholders in the company.

The provisions under which it is claimed that the defendants are liable is section five of the amending Act of 1855, which is as follows: "In the event of the assets of the said company being insufficient to discharge its liabilities, the shareholders shall be liable in their private and individual capacities for an amount beyond the stock held by them equal to the amount of the stock."

The substantial questions which have been raised upon the argument are two, viz.: (1) Whether the provisions of the Winding up (Union Bank) Act of 1895 have not in effect worked a repeal of the Act of 1855, or by the altered condition of affairs thereby created in the status and relations of the shareholders, creditors and others virtually abrogated, or put an end to the operation of the section of the Act of 1855 above quoted; (2) Whether the liquidators have any authority

to enforce this claim against the shareholders as contributories by the present mode of procedure.

I consider it better, for the reasons which I shall state presently, to dispose of the second of these questions first. The contentions on the part of the defendants may be stated broadly to be that the shareholders are not "contributories" within the meaning of any statute or other law applicable to this company, and that therefore the present proceedings are without authority and this tribunal has no jurisdiction to hear or adjudicate upon the claim.

The Union Bank of Newfoundland was incorporated in the year 1854. Neither before nor since that date has there been any legislative enactment in this colony in relation to the winding up of companies applicable to this company until the special Act of 1895 for the winding up of this bank.

There was therefore at that time and now is no local statute professing to deal with the subject of the rights, liabilities, etc., of "contributories" to companies of this sort. It follows, therefore, that the only statute law applicable to the present case must be some provisions of the Imperial statute law, either applicable generally to this colony or made to apply to the present case by the special provisions of the Union Bank Winding up Act (1895).

The history of Imperial legislation in relation to joint stock companies, winding up, contributories, etc., was very concisely stated by Mr. Furlong in his argument, and the present position and effect of that legislation very clearly demonstrated. The law which would apply to such a case as this in England is the Act which is known as the Companies' Act, 1862. It may be stated briefly and generally that before the passing of that Act a "contributory," in the sense in which the word is used in the present proceedings, was not known to the law.—Under a charter or act of incorporation containing a provision such as that of the section five of the Union Bank Act of 1855, the liability of the shareholder being to or towards the creditors of the corporation, the creditors' remedy was by an action in the first instance at the suit of the creditors against the corporation, and by *scire facias* upon the judgment against the individual shareholders. The Act of 1862 worked a complete revolution in the status and relation of the shareholders towards the corporation and the creditors. By that Act, as was correctly stated by Mr. Furlong, the contributory may be said to have been, as it were, created, his status and liabilities

defined, and the procedure for the enforcement of those liabilities prescribed. Instead of being sued in the manner just stated by the individual creditors, the shareholders and other parties to whom the name "contributories" is declared to apply are required to pay or contribute the amount of their several liabilities into a common fund, to be applied and distributed like the other assets of the corporation among the creditors; and special provisions are made conferring upon the liquidators appointed by the court authority to proceed against the "contributories" for the amount of their respective liabilities, and methods and rules of procedure for that purpose are prescribed by the Act and by the court under its authority.

The question of the substantial liability of the shareholders or other person who is made a contributory is left to depend upon the terms of the original charter or act of incorporation, and are not altered or affected by the provisions of the Act of 1862; but, as regards the enforcement of that liability, the parties to be made promovent or plaintiff in the proceedings, the jurisdiction of the tribunal, the methods of procedure, etc., all these matters are the subject of new and elaborate prepared machinery, so to speak, upon which amendments have from time to time been made, and especially under an Act of 1890 and rules of court made thereunder. In all these matters an entire revolution in the law has been effected by this Act of 1862 and subsequent amending acts.

In the present case the procedure which has been adopted is that which is prescribed by these acts and rules. Mr. Greene, on behalf of the liquidators, fully accepted the inevitable position that the present proceedings could only be sustained upon the assumption that the provisions of these acts apply to the Union Bank and its shareholders, and that the shareholders are "contributories" by virtue of the provisions of those acts. It did not appear at the argument to be disputed that the defendants would be "contributories" under the provisions of the Imperial Acts if they were applicable in this case. Section 200 of the Act of 1862 is very comprehensive and reads as follows: "In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges and ex-

"peuses of the winding up of the company; and being such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due by him in respect of any liability as aforesaid," etc.

The words "liable to pay or contribute to the payment of any debt or liability of the company," would appear clearly to include a shareholder of the Union Bank under section five of the Acts of 1855.

It remains, therefore, only to inquire whether the provisions of this section are brought into force and made to apply to the defendants by virtue of the provisions of the Union Bank Winding up Act, 1895.

The particular provisions of the Act relied upon by the liquidators as having this effect are the latter portion of section six and section ten.

Taking section ten first, it reads as follows: "Any powers by this Act conferred on the court are in addition to and not in restriction of any other powers *subsisting either at law or in equity* of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the bank, for the recovery of any call or other sum due from such contributory, or debtor, or his estate; and such proceedings may be instituted accordingly." What the precise or effective meaning of this section may be, or be intended to be, I do not pretend, nor does it appear to me that I am required, to explain. It is sufficient for the present purpose to observe that it contains no substantive or independent enactment within itself. It does not profess to create or define a "contributory," or to import or adopt the provisions of the English Act of 1862, or any other Act for that purpose, or to create, impose or confer in itself any new power, duty, liability, status or relation; it simply and only declares the provisions of this Act (*i. e.*, other portions or sections of this Act) are to be construed as cumulative or in addition to other laws, statutes, etc., *subsisting*, whatever they may be; or, in other words, it declares that the law, whatever it may have been in relation to this matter, is unchanged except so far as it may have been added to or amended by other portions of this Act.

As already stated, the other particular part of the Act relied upon by the liquidators is the latter words of section six; they are as follows: "In matters of procedure not provided for by the said chapter (*i. e.*, chapter 90 of the Consolidated Statutes relating to Insolvency), the mode of procedure shall be the

"same as that adopted in the Supreme Court of Judicature in England under the Acts which regulate the winding up of companies in England, and the forms under the said Act may be used as far as may be found necessary or applicable."

This part of the section must be read in connection with the context, from which it appears that the object of the provision may be described as auxiliary, i. e., to assist in giving effect, as far as procedure is concerned, to the main scope and purpose of the Act, which by a perusal of its several parts will be found to be, broadly speaking, the application, so far as possible, of the law relating to the insolvency of persons, and the distribution, &c., of the estate, &c., of insolvent persons, to the Union Bank as a corporation, and its assets and effects. In a few words the scope and object of the Act may be stated to be, (1), that the Union Bank, being a corporation, may be declared insolvent like a person or "individual" or "partnership;" and (2), that its assets and effects shall be realized and distributed in the same manner and upon the same principles as an ordinary "insolvent" estate. So far as regards that which constitutes the wide and important difference between a person and a corporation, viz., the constitution of the corporation itself, its several members or shareholders or "contributories"; in short, as to all matters to which the English law relating to contributories pertains, there appears to be a most careful avoidance throughout the whole Act of any reference whatever to any of these matters except the words of the sixth section, which, as I have shown, are merely declaratory and apparently meaningless in themselves, there is not the slightest indication anywhere in the Act of any intention on the part of the Legislature of incorporating into this Act or even of recognizing the existence of the principles or provisions of any statute or other law relating to the position, status, relations, duties, liabilities of shareholders, members or "contributories," either as between them and the corporation or *inter se* or otherwise.

The question, therefore, which has to be determined assumes this form, viz., whether the radical and sweeping change or revolution in the law relating to shareholders and other such matters, which may for convenience be called the whole statute law relating to "contributories," with all the effects and consequences which we have been considering, can be held to have been imported, so to speak, into the Union Bank Act, i. e., are embraced or comprehended within the words "matters of procedure," and "mode of procedure adopted by the Supreme

"Court in England," etc. As the result of the best consideration that I have been able to give to the matter, I hold that it is impossible to read these words in any such sense. To do so, would be, to my mind, to depart from the simplest and commonest rules of construction. The words in themselves have a clear and well-understood meaning, and, as I have shown, the context and general scope of the Act furnish no indication of any intention, on the part of the Legislature, to strain or pervert them beyond their proper meaning. It is impossible to suppose that if the Legislature had deliberately intended to introduce into this Act so radical and far-reaching a change in the position, status and liabilities of the defendants and others as is effected by the full and elaborate provisions of the English Acts, that they would not have at least endeavoured to give effect to that intention by something like suitable and express language. It has been urged in favor of the construction contended for by the liquidators that unless they are interpreted in this sense they have no meaning, or rather that their strict and literal meaning could have no effect, there being no "procedure" to which they could apply, and that therefore the words should be interpreted in the larger sense in which they would take effect. To which I reply that the only cases of which I am aware in which the court would be justified in departing from the clear and ordinary meaning of the words of the statute, and attributing to them a larger or a different meaning, are those in which it appears (1) that the words, if interpreted literally, could have no sensible effect in view of the circumstances or subject matter, or that there are no facts or circumstances to which they could apply; and (2) that the legislature clearly intended them to be used in the larger or different sense contended for. In the present case the first of these conditions has not been made to appear. Though the words are undoubtedly, apparently, without any very clear and definite meaning, so far as their possible application is concerned, yet I cannot go so far as to hold that there are no conceivable facts or circumstances to which they could in their strictly literal sense be applied, or, in other words, that there may not possibly be some "procedure" under the English Companies' Acts which could be brought into operation in the course of the winding up of the Union Bank under this Act. As to the second condition, I have already stated that the whole scope and purpose of the Act in its other parts are, to my view, opposed to the strained construction which I am asked to apply to the words in question.

If I was called upon to guess or to speculate as to what was really the intention of the legislature in relation to these words, I could only say that I do not believe that in broad and actual fact there was any clear or definite idea intended to be conveyed. It looks as if the words were thrown in, as it were, by the draftsman vaguely and loosely without his knowing or caring very much what might be their meaning or possible effect.

For the reasons which I have given, I consider that judgment must go in favour of the defendants; that the shareholders in the Union Bank are not "contributories" in the sense in which the word is used in the English Companies' Act, or liable in that capacity in such a proceeding as the present, and that I have no jurisdiction to proceed with the settling of the list or to make any order upon the defendants in these proceedings.

With regard to the question as to whether or not the provisions of section five of the Union Bank Act, 1855, defining the liability of the shareholders, have been altogether repealed or abrogated by the enactment of the Act of 1895, I consider that having determined as I have upon the other question I am not called upon nor is it within my province to deal with this one. Any opinion which I might give upon it would not be binding upon any party in another proceeding, such as an action at the suit of a creditor against a shareholder, nor is it now necessary for the purposes of the present proceeding.

Let the orders be drawn up in accordance with this judgment and settled, if necessary, before me.

Upon the question of costs, I will hear parties further at another time.

Mr. Greene, Q. C., and Mr. H. E. Knight for liquidators.

The Attorney General (Sir W. V. Whiteway, Q. C.), Mr. Emerson, Q. C., H. H. Carter, H. R. Hayward, M. W. Furlong, A. B. Morine, J. M. Kent, and F. J. Connolly, for shareholders.

1896, *September*. BY THE COURT.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.]

Will—Construction—Limitation of estate—Absolute estate—Contingency—Life interest.

Testator bequeathed certain freehold property, in trust, for the use of his two sons, and, should both his sons die without leaving issue, to his daughter for life, and, after her decease, to the use of her children, and should she die leaving no child or children, then to the use of his next of kin; one son having died leaving a child.

Held—That the interest of the two sons was an absolute one.

Testator bequeathed a sum of money to his executors in trust for his daughter for life, after her decease for her children, share and share alike, and in case she should die leaving no child or children her surviving, to the use of his two sons, share and share alike, for life; and, on the death of either, one-half thereof to the children of the deceased son, the other half to the survivor until the death of the survivor, then the whole to be divided between the children of his sons, share and share alike. The daughter having predeceased both sons, leaving no children, and one of the sons having died leaving a child,

Held—That, during the lifetime of the surviving son, the interest goes half to such son, half to the child of deceased son, and, on the death of such survivor, the principal to go to the children of both sons, share and share alike; and, in the event of the surviving son dying without leaving a child, the whole principal to go to the child of the other.

THIS was an action taken by the trustees of the insolvent estate of Edwin J. Duder claiming to be entitled to one-half of the lands and waterside mercantile premises mentioned in the fourth paragraph of the will of the late Edwin Duder, and to one-half of the bequest (£10,000) mentioned in the fifth paragraph of the said will.

Edwin Duder, who died in 1881, by his will devised and bequeathed as follows:—

*“Fourth—I give, bequeath and devise to my executrix and executors all my land and waterside mercantile premises, situate on the south side of Water street, in St. John’s, purchased from Charles Fox Bennett * * * * to be held by my executors and executrix, charged and subject as aforesaid upon trust for the use of my sons, Edwin John and Arthur George, and should both my sons die without leaving lawful issue, then to the sole and separate use of my daughter, Harriet Elizabeth, for her life, and, after her decease, to the use of her children, and should she die without leaving children or child, then to the use of my next of kin. And I do hereby direct and it is my will that if the survivor of my sons should desire to occupy the said land and waterside mercantile premises, he shall be entitled so to do, paying to the parties entitled to the use of the other half thereof a reasonable and fair rent annually therefor, to be ascertained in case of disagreement by arbitration.”*

"*Fifth*—* * * * I also give and bequeath to my executrix and "executors the further sum of two thousand pounds currency, and also "the further sum of eight thousand pounds currency * * * to hold "upon trust for the sole and separate use of my said daughter for her life, "and, after her decease, for the use of her children, share and share alike, "and in case she shall die leaving no child or children her surviving, then "to the use of my said sons, share and share alike, for life, and upon the "decease of either of my sons, then one-half thereof to the use of the "children of the deceased son until the decease of my surviving son, and "the other half thereof to the use of the survivor of my sons for his life, "and after the decease of the survivor of my sons, then the whole to the "use of the children of my sons, share and share alike; and should the "son which predeceased the other leave no lawful issue him surviving, "then the whole to the use of my surviving son for his life, and after his "decease to the use of his children, share and share alike; and should "both my sons die without leaving lawful issue them surviving, then to "the use of my next of kin."

The widow of the said testator died in the month of January, 1882, and his daughter died in 1886 without leaving any children. Arthur died in December, 1881, leaving a son him surviving, who is still a minor, and to whose estate letters of guardianship were granted to the chief clerk of the Supreme Court. Edwin John Duder, the surviving son, was in January, 1895, declared insolvent, having previously mortgaged his interest under the above clause of the will of Edwin Duder, deceased, and the trustees claim in these proceedings as above mentioned.

The argument took place in April, 1896, before the full Court (consisting of Sir F B T. Carter, C.J., Little and Winter, J.J.)

On the 8th day of August Mr. Justice Winter delivered the following considered judgment of the court:—

In this case the questions which we have to determine are as to the construction of two clauses, numbered respectively fourth and fifth, of the will of the late Edwin Duder, and the interest which, under the facts that have occurred since the death of the testator, now vests in each of the several parties to the suit, legatees under the said will and those claiming through or under them.

The clause of the will, as well as the facts which are relevant to the questions to be determined, are fully set forth in the pleadings, and there is, therefore, no necessity for reciting them.

We have given most careful consideration to the language used by the testator and to the arguments of counsel, and applying this language to the facts which have occurred since the

death of the testator, we are of opinion: (1.) As to clause fourth, relating to the land and waterside premises, that the sons John and Arthur took an absolute or fee-simple estate, as tenants in common, undivided, with a right to the survivor (John) if he so choose, to occupy the whole of the property during his life, upon paying rent for one-half to the representatives of Arthur, deceased, and that, therefore, the estate or interest of the sons, respectively, are now vested as to John's share, *i. e.*, the equity of redemption, &c, in the plaintiffs, and as to Arthur's in the defendant, Isabella Duder, as administratrix of his estate.

(2.) As to clause fifth, relating to the bequest of £10,000 in money, that during the life of John, the surviving son, the yearly interest or income goes one-half to him and one-half to the infant son of Arthur (the plaintiffs being now the owners of John's share or interest); that upon the death of John the principal is to go to the children of John (if any) and Arthur, share and share alike, but if there be no children of John then the whole goes to the infant son of Arthur (or his representatives); or, in other words, the infant son of Arthur takes the whole of the estate in remainder, *i. e.*, the principal, upon the death of John, subject to the contingency of its reduction or division in the event of a child or children being hereafter born to John.

The costs of all parties to be paid out of the estate of Edwin Duder.

Mr. Browning and *Mr. Furlong* for the plaintiffs.

Mr. Clift for administratrix of A. Duder.

Mr. H. E. Knight for the guardian of A. G. Duder.

Sir W. V. Whiteway, Q. C., and *Mr. Pitman* for the executors of E. Duder.

1896, October. BY THE COURT.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.]

Sealing laws, 55 Vic., cap. 2, sec. 2—Penalty—Information against firm—Mens rea—Withdrawal of previous information—Appeal by informer.

An information against a firm in the firm name is irregular ; it is necessary to set out the names of the constituents of the firm in the information. It is not necessary to prove *mens rea* against the accused under 55 Vic., cap. 2, sec. 2.

THIS was a special case stated by his honor judge Conroy for the opinion of the Supreme Court, and was held before a full bench (consisting of Sir Frederic B. T. Carter, C. J., Little and Winter, J. J.

The nature of the case, the facts and arguments of counsel, are sufficiently apparent from the judgment of the court.

Mr. Justice Little delivered the following considered judgment of the court :—

This matter comes up on a case stated by his honor Judge Conroy for the opinion of this court, in relation to a charge brought by the appellant against the respondents involving an alleged breach of the Act 55 Vic., cap. 2, sec. 2, entitled "An Act to regulate the prosecution of the seal fishery." This section provides as follows :—

"No seals shall be killed by any crew of any steamer or by any member thereof, before the fourteenth day of March or after the twentieth day of April in any year, nor shall seals so killed be brought into any port of this colony or its dependencies, as aforesaid, in any year, under a penalty of four thousand dollars, to be recovered from the master, owner, or other person on whose account such steamer shall have been sent to such fishery."

The proceedings were commenced upon the information preferred by the complainant, who is the Inspector-general of constabulary, and were tried before and adjudicated upon by Judge Conroy in his capacity as stipendiary magistrate. It appears to have been established in evidence at the trial that the str. *Aurora* was at that time the property of the respondents ; and that she was fitted out for and engaged in the prosecution of the seal fishery last spring by them and on their account ; that her crew killed seals after the 20th of April last, and, in the prosecution of the voyage, put them on board the *Aurora*, and by her these seals were brought into this port, and were taken

over by respondents. The respondents' counsel urged at the trial, as grounds for dismissing the charge, that, in the first place, it appeared that one Robert Pettigrew had laid a similar information against the defendants, and that his rights as prosecutor subsisted for three months, not then expired, and therefore the informer in this case had no *locus standi*. Secondly, that the evidence showed that the seals were killed outside and beyond the maritime jurisdiction of this colony and came under the ruling of the Supreme Court in the case of Rhodes *v.* Fairweather (decided in 1888), and because the 55 Vic., cap. 2, sec. 2, was repealed by implication by 58 Vic., cap. 10, sec. 3, and would require a special enactment for its revival. Fourthly, that a suit for a penalty cannot be taken against a firm *nomi- natim*, because the penalty may ultimately be required to be enforced by imprisonment and the firm-title may be the trading name of a foreign syndicate. Fifthly, because knowledge on the part of the respondents of the violation of the statute should have been shown. In disposing of the case so far the magistrate held that the defendant owners had no knowledge of the breach of the law; that to bind them for the offence of the servant express words were needed to provide that it would not be necessary to prove the owners' guilty knowledge. He also held that it was proven that the law had been violated by the crew and master of the *Aurora*, and that under the statute no right of appeal was given to the informer. Under these circumstances the magistrate asks for the opinion of this court upon the following questions of law:—Was proof of guilty knowledge on the part of the defendants necessary? Had the informer a *locus standi* whilst the first informer's information subsisted, though the latter's process on information had been withdrawn? Was the summons in the name of the firm regular? Can the court under the Summary Jurisdiction Act (Imperial Statute) reduce the penalty, should this court remit the matters back? And lastly, had the informer any right of appeal under the statute?

We have given this important matter and all the contentions and questions spread upon the record our very best consideration. We have now merely to record our opinions as asked for by the magistrate. Whilst appreciating, as we do, the extent and value of the important interests involved in the determination of the contentions raised in this case, we must at the same time say we have not experienced so much difficulty in arriving at a conclusion upon it as was anticipated at the

hearing of the arguments had at bar. The facts are few and fully established, and, as we take it, the law applicable to them is equally well established in the rulings and the principles contained in the judgments rendered in a succession of reported cases, as well as in other authoritative works of reference. In brief, then, we may, in the first place, observe that from a reading of the Act, the intention of the Legislature is found to be clearly conveyed, and is directed towards the consideration of interests of the public so far as they are involved in the prosecution of this valuable fishery. Other Acts of our Legislature have had place in our laws to secure the same laudable end, but their provisions, in some important particulars, were found insufficient, or when attempted to be enforced were subject to such evasions as rendered further legislation on the subject imperative. In conformity with authority we have to construe this Act according to the intention of the Legislature, and in doing so we must adhere to the ordinary meaning of the words used and to the whole scope of the Act.

The section may be inartificially drawn, and the language might have been more minute and particular, especially in a matter where common law rights were to be so seriously affected, and a penalty so heavy was imposed; still, from the terms of the whole Act, and the operative words used in the section in question, the real intention of the Legislature can be collected with certainty, and no difficulty should have been experienced in ascertaining and determining the meaning conveyed by the language used. Having satisfied our minds in this important particular we fully endorse the statement of the magistrate, set out in the special case, that the fifth ground of contention taken by the respondents is the most vital in the defences set up by them at the trial of their case. It will be seen from the section the crew of any steamer are forbidden to kill seals after the 21st of April, but it is observable that no penalty or punishment is imposed for infringing the terms of that part of it. It may have been considered from experience futile to attempt to establish or obtain proof of the commission of the act, or the seals may have been taken under circumstances that might cast a doubt upon the assumed illegality of the act. In any case, whatever incidents may have arisen in the prosecution of the voyage we have it clearly declared in express terms, that no seals so killed shall be brought into any port of this colony under the penalty prescribed, and which may be recovered from the masters, owners or other persons on whose

account such steamer shall have been sent to the fishery. Here is a substantive act expressly forbidden to be done, and, if committed, the party on whose account such steamer was fitted out and sent on the voyage shall be subject to the payment of the imposed penalty. In the first place, as stated above, the Legislature, having evinced its intention in former enactments to protect this source of wealth by regulating the prosecution of the sealing adventure, found it impossible to have the law successfully applied to the crews infringing the enactments so made, and determined, at last, that the owner of the steamer or the party on whose account she was fitted out should be made answerable or liable for the conduct of those he had placed in charge of her on these voyages. Under the operation of this section, although the party charged may not have gone in her on the voyage, nor have been truthfully informed of the time when the seals were taken; nevertheless, if his agents, the master and officers of the steamer, directed or ordered the men to take seals or connived at their taking before or after the prescribed time, and the seals were placed on board and brought in by the steamer so fitted out by the accused, then he became liable to the penalty prescribed.

This liability, it was considered, would be effectual and would imperatively call for the necessary orders and instructions from owners and parties fitting out such steamers to warn and direct their servants in charge thereof to govern and conduct themselves in the course of the voyage in accordance with the law. The section, it will be observed, is restrictive of the action of those interested and engaged in the adventure, but it does not create expressly an offence. But although there is no substantive criminal offence created, yet if the act be done, that is, if the seals so killed be brought in by the steamer, the party so charged was to pay the penalty for such importation. We may now therefore observe that you will not find any of those terms in this section of the Act as are used in the other statutes creative of criminal offences and indicative of the intention of the Legislature in classifying them. The plain language here used is not qualified by such terms as "knowingly," "wilfully," or *bona fide*, or other such phrases, which are regarded as affording an opportunity (generally availed of) by an accused to escape a penalty or punishment imposed for an infringement of the law. The language in which this penalty is imposed may be regarded as equivalent to an express prohibition to do or permit this particular act to be done, but certainly in that

sense and meaning it should have been understood by all parties in the position of the respondents. The Act was in operation sometime previous and is still in force, although it was contended on the part of the respondents that it was in part repealed by the 58 Vic., cap 10, sec. 3, which enabled parties to take seals up to the twelfth of May for that year only. This was not an absolute repeal of any of the previous Acts, it merely suspended the operation of a part of a section for the then year. If there were an absolute repeal of the Act by an Act limited to continue for a certain time, the prior law would not revive after the repealing statute was spent, unless the intention of the Legislature was so expressed. See *Warren v. Windle*, 3 East 205; *R. v. Rodgers*, 10 East 569, and *Divars*, on *Stats.* p. 534.

Returning then to the question of the operation of the section, and the effect of the omission of the words to which we have referred, we are reminded of the familiar doctrine in reference to criminal intention, so pertinently mentioned by the magistrate, and embodied in the well known maxim that "the Act itself does not make a man guilty unless his intention were so." This must have been in full view of the mind of the Legislature at the time of the passing of this statute, and it evidently was intended from the structure of the law that the rule should not have place in the practical application or operation of this section or of any other part of the statute.

There are limits to the operation of that beneficent doctrine, and in many instances when the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it, and the doing of it may form the subject matter of an indictment or of an information, without the addition of any corrupt motive or wilful intention.—*R. v. Sainsbury*, 4 T. R. 457; *R. v. Woodfall*, 5 Burr. 2667; *Hipkins v. The Birmingham, &c., Gas Co.*, 5 H. & N. 74; *Reg. v. Thomas*, 33 L. J. M. C. 22; *Hudson v. McRae*, 4 B. & S. 585.

"There are," said Brett, M. R., "enactments which by their form seem to constitute the prohibited acts into crimes, and by virtue of these enactments persons charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*" It is further laid down that the reasons why it is in some cases unnecessary to prove a *mens rea*, is because the statutes do not constitute the prohibited acts into crimes, but only prohibit them for the purpose of protecting individual interests,

rights or property, or the public revenue. Now by way of illustrating the operation of, and interpretation applied to some of these Acts, we may briefly refer to a few cases such as that of *Betts v. Armstead*, 36 *W. R.* 720. This was a prosecution by information laid for the infringement of the provisions of the 38 and 39 Vic., cap. 63, "Sale of Food and Drugs Act." The respondent there was charged with having sold adulterated bread, &c., and during the proceedings waived the taking of the evidence of the public analyst, contending that as he (the respondent) did not know that alum was in the bread, he was entitled to be acquitted. The magistrate refused to convict. The informer appealed, and the court reversed the finding on the ground that the magistrate thought the word "knowingly" should be read into the section, but the court were of opinion that it ought not to be read in unless that were the intention of the Legislature, &c. It was observed that the magistrate followed a decision on another statute, but the court held that no decision on any other statute could have any effect on the construction of this one. The section there, as in this case, only imposed a fine or penalty.

The foregoing ruling was approved of in the case of *Pain v. Boughtwood*, 39 *W. R.* 428. In the case of *Lane and Collins*, 14 *Q. B. D.* 193, it was observed that an earlier Act on the same subject contained the words "to the knowledge of such person," but in the Act under consideration in that case the words were omitted, consequently the *mens rea* was not necessary to be shown in order to constitute the offence.

In the case of *Hotchin v. Hindmarsh*, 39 *W. R.* 607, on appeal, Coleridge, C. J., stated *inter alia*, that where a particular intent is made part of the offence (by the statute) the magistrates are to judge as to whether the intent existed. But the act itself is in itself a physical act, &c., the person who performs it is the person appointed by the section. And in *Cundy's case*, 13, *Q. B. D.* 207, the respondent, Lecocq, sold liquor to a drunken person who had given no indication of intoxication, &c. The accused was brought up for a breach of the 13 sec. of the Imperial Licensing Act, 1872, and contended that it should be shown that he was aware of the condition of the person to whom the liquor was sold. The conviction by the magistrate was upheld by the court.—Stevens J. observed in delivering judgment, that the words of the section amounted to an absolute prohibition of a sale to a drunken person, and that the existence of a *bona fide* mistake is not an answer to the charge. The clause said nothing about

the knowledge of the state of the person, and it was not an element in the defence, and the following words of Stevens, J., accentuate the meaning of the law in such cases; he observed that he believed "the reason for making this prohibition absolute, was that there must be great temptation to publicans to sell liquor without regard to the condition of the customer to warrant the application of the maxim referred to."

In the case of *Fitzpatrick v. Kelly*, L. R. 8, Q. B. D. 337, for selling adulterated food, is found also operating in support of such a decision on the question of knowledge and intention, and we find repeatedly similar interpretations of statutes upon Revenue and Excise laws.

In *Hudson v. McRae*, 33 L. J., M. C., 65, the defendant was tried under 23 and 24 Vic., c. 96, for unlawfully attempting to take fish. Blackburn, J., observed that "if the defendant had a real though mistaken belief that he had a right to do the act, there can be no *mens rea*, and he could not be convicted. . . . If it is a crime," he observed, "in which the *mens rea* was made an ingredient I should have said the position was good enough, but the intention in this section was directed to the protection of property, and he therefore held the conviction was right."

In a prosecution under the statute against permitting gambling from being carried on, etc., it appeared that in a previous statute the word 'knowingly' was used, but here it was omitted. The court held the omission was designed, and that in order to convict it was not necessary to prove actual knowledge in the sense of seeing and hearing by the party charged; but it was sufficient if some circumstances existed from which it might be inferred that the accused or his servant had connived at the commission of the act complained of.

In the case of *Mitchell v. Brown, et. al.*, 23 L. J. M. C. 54, a prosecution for infringing the provisions of 54 Geo. III, c. 159, for obstructing a navigable river, the owner of the vessel was convicted of the offence, although he was not present or on board when the act complained of was done.

We may state then, knowingly should not be read into a statutory offence, unless it is clear that the legislature intended some such qualification. In his observations upon the case of *Cundy*, Stevens J. remarked that the maxim quoted, and upon which so much weight was placed, "is not nearly so robust as it once was."

We consequently are of opinion that it was not necessary

under this statute, to show that the respondents were aware of the fact that these seals had been taken by the crew of their steamer after the 21st of April, and that they are amenable to the provision in question. And further, it is not as masters of the persons in charge of the steamer that the respondents are held to be liable to be sued in this prosecution, but because they are the owners of the steamer *Aurora*, and the persons on whose account she has been fitted out and sent to the seal fishery. It is not therefore alone by any necessary inference drawn from the terms or language of the statute, but under the express terms, that the respondents are held liable. The hardship of the case may be very serious for the owners of these steamers to be held accountable for the conduct of the masters and officers of their ships, but under such conditions for breaches of the Revenue laws, as already observed, through carelessness, indifference or the incapacity of servants holding such positions, forfeiture or confiscation of the owner's property frequently follows. A trader, for instance, was held liable for the illegal act of his servant in protecting smuggled goods, the master being absent from the ship and the servant acting upon the exigency of the moment. As was stated by Blackburn J., in reference to the Licensing law:—"The act would be a dead letter, if it were necessary to prove that the licensee knew that the law was being broken, it is sufficient if his servant did it in the ordinary performance of his duty."

The next question to be disposed of is,—had the informer in this case a *locus standi* whilst the first information subsisted, though the latter process on information had been withdrawn? No authority was cited to us by counsel on this question, but from the meaning we attach to the 8th section, we are of opinion that if the informer refuse to proceed with his charge or information and the summons is regularly withdrawn and dismissed at any time before the expiry of the three months prescribed for the prosecution of the same, thereupon any other party is at liberty to lodge fresh information under the statute, and have it tried as if no previous information or summons had been lodged or issued. Therefore we answer this question in the affirmative.

We are next asked to pronounce upon the regularity of the form of the summons, in charging, as in the information, the firm of Messrs. Bowring Brothers instead of setting out the names of the members of the firm as defendants. Exception appears to be have been taken to this form of procedure, but no authority

in point was cited on either side at bar. It is of most serious importance and was very properly and lengthily and forcibly observed upon by the respondent's counsel. If the parties, for instance, had been convicted, it was pertinently asked, and it became ultimately necessary in the enforcement of a judgment to cause them to be arrested, how could you in reason, under such a record, issue a warrant for the arrest of any individual member of the firm? It is a palpable irregularity affecting the proceedings at the very threshold of the prosecution, and should have been amended. Such an oversight is inexcusable, as the attention of all parties was directed to it before the magistrate rendered his decision in the case.

In our opinion the names of the parties composing the firm and who are proven to be owners of the steamer, and on whose account she was sent to the seal fishery, should have been set out *nominatim*. It is all very well to state that in civil proceedings a different practice prevails, but if so, it is by virtue of express provision being made in the Judicature Act for that purpose. But even under such circumstances, we find that it was held that a plaintiff could not issue a writ for service abroad against a foreign firm in the firm name, and Fry, L. J., observed, that "no doubt courts have an inherent power to mold the practice to meet the exigencies of particular cases," but in that case ordered that the members of the firm should be sued *nominatim*.

In *Paley on Summary Convictions*, p. 198, it will be found to be briefly stated,—that if there be several offenders each must be named; and on further research into authority we find the question passed upon at the early date of 1810, by Lord Kenyon, in the case of *Rex vs. Harrison*, 8 T. R., 508. That was an appeal upon a conviction under the excise laws, and was set down for argument, and when it was called the Chief Justice observed: "It is impossible that a conviction of Such-an-one & Co. can be supported. It is a mere nullity, even against the party named. The courts are bound, in duty, to the care that summary proceedings before magistrates are regularly conducted, whether the parties objected to them or not. We cannot tell upon the face of this proceeding but that the delinquency of Harrison's partners, who are not before the court, may have been imputed to him. As no action could be maintained by Such-an-one & Co. without naming all the parties, so neither can a conviction be sustained in this form." The conviction was there quashed by order of

the court, without hearing counsel for either party. The application of such a positive ruling calls for no further notice from us, beyond a reference to the fact that this being a quasi-criminal proceeding of serious moment to the accused, greater particularity is called for and should be exacted, than in proceedings purely civil. It is to be regretted that when the error was pointed out and excepted to during the trial, that its importance was not duly appreciated and an amendment made, there and then, in the information and summons in that particular.

We find it unnecessary to observe upon the existence of any right to reduce a fine that might have been imposed, and, as to the last question as to the right of appeal on the part of the informer, we have, we consider, answered it sufficiently in the affirmative. But we may further observe that in the Dominion of Canada, under special enactment, the right of appeal in such cases is confined to the defendants.

Aside from the powers conferred on the Supreme Court under our Judicature Act to deal with appeals from inferior courts, we must remember that under the provisions of the Summary Jurisdiction Act, 1884, (Imperial statutes), which is operative here, by the 5th section thereof it is provided that the Court of Appeal may confirm, reverse or modify the decision appealed from, or may remit the matter with its opinions thereon, &c.

We, therefore, in exercise of our power, remit this matter for the further consideration of the magistrate, under and subject to the opinions and decisions set forth in this judgment.

Mr. Johnson, Q.C., for complainant.

Mr. Emerson, Q.C., for respondents.

S. S. HOPE & PANTHER CO. *v.* TRUSTEES BAINE,
JOHNSTON & CO.

1896, *October*. BY THE COURT.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW].

Sale of ship—Appurtenance—Coal.

On the sale of a ship, lying in port, coals in her at the time are not a part of the ship, nor are they covered by the words "tackle," "appurtenances," &c., and do not pass to a purchaser of the ship unless expressly mentioned.

ALL the facts and arguments of counsel in this case are set forth in the judgment.

The judgment of the court was delivered by Mr. Justice Little as follows:—

In this case the plaintiffs claim to be entitled to recover the sum of \$1,928 from the defendants, being the value of about two hundred tons of coals which were on board the steamship *Hope*, and two hundred and eighty-two tons on board the steamship *Panther* when these ships were purchased by the plaintiff company in the month of March, 1895.

From the evidence taken before us at the hearing of the case, it appeared that the steamers were purchased by Baine, Johnston & Co. in the years 1890 and 1892, respectively, and were shortly thereafter mortgaged to the Bank of Scotland under the ordinary form of mortgage. They were purchased to be used and engaged in the prosecution of the seal fishery, and were so utilized by them up to the year 1894. It was the rule and usual practice on the part of the firm to have their steamers coaled long before the time for their departure from port for the prosecution of their sealing voyages.

In the early part of 1894 these ships had been coaled at the cost of the firm or defendants and were securely anchored and moored in the harbor awaiting the time for their departure on their respective voyages.

Under these circumstances the mortgagees, in the month of March, 1895, transferred their interest under the mortgage to the plaintiff company, who became the purchasers of the steamers. But the defendants refused to deliver possession unless payment were then made for the coals on board, consisting of the quantities stated in the particulars of claim.—The plaintiffs, in order to despatch the steamers to the fishery, were, under the circumstances, forced to pay over the value of the coals, but did so under protest, and hence this action.

After due consideration of the facts in evidence and of the contentions of counsel upon the argument, we are unable to accept the view taken by the plaintiff company of their right to recover in these proceedings, and consequently hold that coals cannot be regarded as a part of the ship, nor would they be covered by the usual and ordinary terms of "apparel," "tackle," "appliances," "appurtenances," &c., without some express mention thereof in the mortgage. In *MacLachlan on Shipping*, pages 7, 18, it is noted that under the word "ship" questions have

arisen as to whether this or that article or thing passed under the contract of sale, and some writers on maritime law inform us that if a "ship be sold with the tackle and furniture" the ship's boat is not conveyed by these words. We also find that in the case of *Hend vs Neale, 2 Stak, R.*, in an action on the sale of a ship and a quantity of iron kintledge, where full delivery of the latter as claimed for under an alleged agreement was refused, it was held that as no mention had been made in the contract of the kintledge it could not be considered as part of the ship or necessary stores.

The case of *Gale vs. Laurie*, cited at bar, differs broadly from the present case in the facts as well as in the conditions surrounding it. We find it turned on the meaning of a section of the 53rd Geo. III., c. 159, defining the liability of owners in case of damage being done by their vessels. It was there held in the judgment of Abbot, C. J., that the fishing stores of a whaler were covered by the term "ship." The court in that case had to take into consideration the value of the ship, her freight and the value of the articles on board and needful at the time for the accomplishment of the voyage upon which they had entered. But here the ship was not engaged in any voyage, but was and had been for a long time lying moored in the harbor with this large supply of coal on board, and the case will be found to present no analogy to the present beyond the definition applied (under the circumstances there existing) to the term "ship."

It is observable in this connection that in a policy of marine insurance it is the practice to name boats if it is intended that they are to be covered by the policy.

In further illustration of the interpretation of the words "ship" and her "appurtenances," we find the latter word is intended to designate such things as are appropriated to her exclusively, and does not include such things as a ship uses indiscriminately with other ships.—*re Salmon & Wood, ex parte Gould, 2 Morr., 137; Stroud's Jud. Dict., 47.*

It was deposed to in evidence that these coals might have been removed or disposed of if the ship had not been sent on the sealing voyage, and as they were not included in the mortgage the mortgagees could not have interfered with their disposition, for certainly they had no right of property in them. The coals might at any time, consequently, have been transferred to another steamer for other purposes.

According to the statutory form, these mortgages in express terms convey so many shares in the ship, her boats, guns, ammunition, appurtenances, &c. Under it, it has been held, the term "ship," apart from any effect of the term "appurtenances," covers and passes to the mortgagee all articles necessary to the navigation of the ship or the prosecution of the adventure which were on board at the execution of the mortgage, and articles brought on board in substitution for them subsequently to the mortgage.—*2 Moore's, B. C.*

Here, admittedly, there was no coal on board at the time of giving the mortgages; no mention was made of nor any agreement entered into between these experienced parties in relation to an item of such importance connected with the rights held by them in and to these steamers. No practice or custom has been attempted to be shown to exist in relation to the question as it stands. In the absence, therefore, of any written agreement on the subject matter of such a claim, and in view of the ruling in reported cases on the meaning and definition of the terms referred to, and giving some passing consideration to the doctrine applied under policies of marine insurance, we experience no difficulty or hesitation in arriving at the conclusion stated, and accordingly direct that judgment herein be entered in favor of the defendants.

Mr. Morine for plaintiff.

Mr. H. E. Knight for defendants.

1896, *November*. BY THE COURT.

REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.

Railway Company—Level crossing—Negligence—Statutory duty—Gratuitous precaution.

The plaintiff, with his horse and carriage, had occasion to cross defendants' line on the evening of the 11th day of October, 1894, where the line crosses a highway on a level, at a time when the defendants' regular train was due at the crossing. In crossing the line the horse of the plaintiff was knocked down and killed by the incoming regular train of the defendant, and the carriage of the plaintiff was greatly injured. The defendants had observed all its statutory duties at the crossing and given the necessary signal from the incoming train, which were not heard by the plaintiff, but the defendants were in the habit of sending a signal man out through their yard for the purpose of seeing that the approach to the depot was safe for the incoming train. This man was in the habit of warning people using the highway of the approach of trains; on the occasion in question this man was not at the crossing.

Held—That under these circumstances the defendants were not guilty of negligence.

THE Chief Justice (Sir F. B. T. Carter) delivered the judgment of the Court, as follows:—

We are all of opinion, and have been so from the first, that the judgment ought to be for the defendants. The defendants complied with all their statutory obligations. It is urged by the plaintiff that having regard to the rules and bye-laws of the company and the gratuitous precaution undertaken by the defendants of placing a man at this crossing, they had imposed this duty on themselves; but we are of opinion that the evidence clearly establishes in fact as well as in law that no such duty was cast upon the defendants, and however much we may sympathise with the plaintiff in the loss he has sustained by the accident, we are bound by strict rules of law which we cannot but follow in such a case. But looking at the loss which the plaintiff has suffered, we do not think the defendants ought to press for their costs

Mr. Murphy and *Mr. E. D. Shea*, for plaintiff;

Mr. Horwood, Q. C., and *Mr. J. M. Kent*, for the defendants.

886 IN RE P. & L. TESSIER, EX PARTE GOODFELLOW
AND DONNELLY.

1896, November. BY THE COURT.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW].

Assignment for benefit of Creditors—Trustees—increased labors—additional remuneration.

At a meeting of Tessier's creditors, Donnelly and Goodfellow consented to act as Trustees under a deed of assignment for the benefit of Creditors at a remuneration of one per cent. on the realized assets of the estate, on the assumption that Tessier's business was properly managed. It subsequently appeared that owing to the condition of the books, accounts, etc., that the labors of Donnelly and Goodfellow were much greater than anticipated.

Held—On an application for additional remuneration, that the Trustees were so entitled.

THIS was a petition by the trustees under a deed of assignment for the benefit of creditors, made by Messrs. P. & L. Tessier in the year 1893, asking for additional remuneration by reason of increased labor and time which they were obliged to give in winding up the affairs of this estate under the said deed.

The facts upon which the petition was based appear clearly from the judgment.

Mr. Justice Little delivered the considered judgment of the Court as follows:—

These trustees claim additional remuneration by reason of the increased labor and time they were obliged to give in winding up the affairs of the estate. The trust was accepted by them in ignorance both on their part and that of the creditors, of the actual condition of the books and accounts of the estate. It was assumed at the time the assignment was made that the account books and papers were in a somewhat satisfactory state, and consequently they assented to accept one per cent. as their commission for realizing the assets and paying over the dividends. Instead of finding such was the case they found that for the years 1890 and 1891 the books had not been posted, the Journals for 1892 had only been partially posted, and confusion existed in bills and papers of importance. This necessitated the employment of expert accountants, and, together with unexpected litigation, protracted the labors and called for almost continuous attention, care and additional responsibility on the part of the trustees in no way anticipated or known to them at the time of the execution of the assignment. The evidence of the trustees and two or three of the principal creditors sustained the representations or grounds on which they rested their claim.

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The assets realized about \$544,375, and the total amount of liabilities was \$973,000. Owing to the confusion of the accounts found to exist, and the irregularity and omissions in the books, they were necessarily occupied for fully six months longer than they otherwise would have been in completing their labors and fulfilling the obligations of their trust.

Under all the circumstances, and after perusing the papers on file, it is considered the trustees are entitled to an increased allowance of one-third per cent. over and above the one per cent. understood to be allowed them at the first meeting of the creditors upon the amount of assets realized and distributed. And whilst we feel that we have arrived at a just conclusion herein, we regret that there had not been a meeting of creditors summoned to arrange for and dispose of this claim in the same manner as the allowance made in the first instance had been fixed and disposed of. However, as all parties were represented before us, we now, so far as called upon, dispose of the present application.

Mr. Morison, Q. C., and Mr. Morine, for trustees.

Mr. Greene, Q. C., Mr. Johnson, Q. C., and Mr. H. E. Knight, for creditors.

LEVI MARCH v. THE GOVERNMENT.

1896, *November*. BY THE COURT.

REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.

Practice—Rehearing—Right to call further testimony.

Parties may, on rehearing under section nine of the Judicature Act, 1889, call further testimony than that called at the original hearing before a single Judge.

THIS case was tried before Mr. Justice Winter, and judgment was given in favor of the plaintiff for the amount of his claim.

Mr. Horwood, Q. C., now moved on behalf of the defendant to have this judgment reviewed by the full court, and intimated his intention of calling further evidence than that taken at the trial of the case before Mr. Justice Winter.

Mr. Morison, Q. C., *contra*.

The Chief Justice delivered the following judgment of the Court (Mr. Justice Winter dissenting):—

This motion is for a rehearing under section nine of the Judicature Act of 1889. The defendant being the party seeking such rehearing wishes to call further testimony in support of their case. There is no doubt that when an appeal is made from an inferior to a superior court the appeal is made upon the record as it was adjudicated on in the court below, and that in such a case the appellant has no right to call any further testimony on the appeal. In the case of rehearing provided for by this section of the Judicature Act, the proceeding is not an appeal, which means the appealing from an inferior to a superior tribunal, but rather in the nature of a motion for a new trial, for it is for a review of the case by the same court, although differently constituted. As on a motion for a new trial the parties have a right to call any further testimony in support of their case as they may deem necessary, we think that in proceedings under this section the parties have the same right. But as the evidence which the defendant now seeks to bring in is unnecessary and admitted by the other side, it is not necessary to take it.

TRUSTEES COM. BANK *v.* JAMES S. PITTS.

1896, *November*. BY THE COURT.

[REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.]

Commercial Bank—Winding up—Act of Incorporation—Construction—Director's liability.

The liability of directors provided for by sec. 24 of the Act to incorporate the Commercial Bank of Newfoundland, 21 Vic., cap. 2, is not an asset or chose in action of the corporation, and cannot be recovered from the directors by the trustees in insolvency of the Bank.

The issues decided appear sufficiently from the judgment of the court.

THE Chief Justice, Sir Frederic B. T. Carter, delivered the judgment of the court, (consisting of Carter, C. J., Little and Winter, J. J.), as follows:—

The question for determination in this case arises upon the pleadings.

The statement of claim is as follows:

STATEMENT OF CLAIM.

(1) The Commercial Bank of Newfoundland was a company incorporated by Act of the Legislature of Newfoundland, cap.

2, passed in the 21st year of the reign of her Majesty, as continued and amended by an Act, cap. 21, passed in the 40th year of the reign of her Majesty.

(2) On the 10th day of December, A. D. 1894, the following persons were directors of the Commercial Bank of Newfoundland, namely: Augustus F. Goodridge, Jas. Goodfellow, Edwin John Duder, George Adolphus Hatching, and the said defendant.

(3) On the said date the amount of the capital stock of said bank actually paid in by the stockholders was \$306,000.

(4) On the said date the total amount of the debts which said bank owed (deposits excepted) was \$1,318,075 34.

(5) The excess of the total amount of the debts of the said corporation which it owed on the said 10th day of Dec., 1894, over three times the amount of the capital stock actually paid in as aforesaid, that is to say, the sum of \$500,072.34 happened, under the administration and management of the said directors whereby and by virtue of the 24th section of the said Act, cap. 2, passed in the 21st year of the reign of her Majesty, defendant became and was and is liable for such excess in his individual and private capacity.

(6) All the lands, tenements, goods and chattels, or other property of the said corporation, together with the said sum of \$500,075.35 are insufficient to discharge the liabilities of the said bank.

PARTICULARS.

Bank notes in circulation	...	...	...	\$638,401 00
Interest due depositors to Dec. 8th, 1894	...	...	...	10,808 39
Due to customers on current account	...	...	...	282,459 79
Due Union Bank of Newfoundland	...	...	...	59,273 68
Exchange drawn on Bank of Liverpool	...	...	...	21,120 00
Exchange drawn on L. and W. Bank	...	...	...	135,923 17
Due London and Westminster Bank	...	...	...	256,249 82
Due Bank of Liverpool	...	...	...	13,839 49
				<hr/>
				\$1,418,075 34
Less three times the amount of the capital				
stock actually paid up	...	...	...	918,000 00
				<hr/>
Excess	...	...	...	\$500,075 34
				<hr/>

The plaintiffs claim the sum of the excess aforesaid, that is to say, the sum of \$500,075.34.

Dated this 3rd day of December, A. D. 1895.

(Signed), GEORGE M. JOHNSON,
Plaintiff's Solicitor.

The defence is as follows:—

DEFENCE.

The defendant says that—

1. He admits paragraphs 1, 2 and 3 of the statement of claim.

2. On the said 10th day of December, A. D. 1894, the total amount of the debts of the said bank was not \$1,418,075.34.

3. The debts of the said bank on the said date did not exceed three times its paid up capital by \$500,075.34 or any part thereof.

4. Under the administration or management of the said directors the debt of the said bank did not exceed more than three times the paid up capital of the said bank.

5. The defendant will object, in point of law, that the statement of claim shows no cause of action.

(Signed), ALFRED B. MORINE,
Solicitor for Defendant.

The point of law raised by the last paragraph of the defence being one which, if sustained, would substantially dispose of the whole action with consent of parties, the court ordered that it should be heard and disposed of before the trial.

To the facts and matters set forth in the pleadings were added at the argument the Act of Incorporation of the Commercial Bank, 21 Vic., cap. 2, 1858, (Private) which was read and considered as if fully set forth and proven. Also the Act for the Winding up and Liquidation of the Commercial Bank, 58 Vic., cap. 3, (1895), and the fact not specifically stated in the pleadings that the plaintiffs were elected and appointed trustees of the assets and effects of the bank under the provisions of section 4 of the last mentioned Act.

The foregoing statement sets forth all the facts and the private legislation relating thereto which are material to the present issue.

No general law for the winding up of incorporated companies or concerning the liabilities of shareholders applicable to this

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company has been enacted in or is in force in this colony, the rights and obligations of directors, shareholders and officers of such companies are subject only to their special Acts of incorporation and to the common law of England, and in no case to the special Winding-up Act, 58 Vic, cap. 34. Prior to the latter enactment the general law "Of Insolvency" in chapter 90 of the Consolidated Statutes, applied only to individuals and to partnerships, but by that Act, sections 1 and 2 of the principle of the said chapter and of the general law of insolvency were made applicable to the winding up of a bank. One of the principles thus incorporated is that a trustee or the trustee of an insolvent may sue in the same way as an insolvent may have done, and the real question at issue in this claim against the defendant, such an one as the bank itself could have sued upon.

The only statute law of this colony bearing upon the question to be determined is chapter 90 of the Consolidated Statutes "Of Insolvency," referred to in section two of the Winding-up Act.

It is not stated on behalf of the plaintiffs that they rely on a claim upon the express provisions of any English statute applicable to the present case. Nor is it contended that the claim rests upon an analogy of construction or of practical procedure thereunder between the local Winding-up Act and any of the English Winding-up Companies' Acts. Neither is it contended that the claim arises out of any general principle of the law of bankruptcy or insolvency or out of the general principle or effect of the English Companies' Acts applicable by analogy or inference to the present case.

The plaintiffs, through their counsel, Mr. Johnson, Q.C., state clearly and frankly that their case rests upon the express provisions of the several Acts already referred to.

The liability of the defendant under the facts stated in the statement of claim is created by and under section 24 of the Commercial Bank Incorporation Act, which is as follows:

"The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note or other contract, whatever, shall not exceed three times the amount of the paid-up stock actually paid in by the stockholders, and in case of excess the directors under whose administration and management the same shall happen shall be liable for such excess in their individual and private capacities: Provided always that the lands, tenements, goods and chattels of said corporation shall also be liable for such excess."

The right of the plaintiffs to sue for and recover from the defendant the amount of his liability under this section is claimed to accrue under the words of section four of the Winding-up Act: "There shall be three trustees of the assets and effects of the said bank." Taken and read in connection with the provisions of cap. 90 of the Consolidated Statutes, entitled "Of Insolvency," which by the terms of section two of the Winding-up Act shall apply to the winding-up of the said bank in the same manner as they now apply to individuals and partnerships, etc.

The provisions of chapter 90, "Of Insolvency," relating to the rights, powers, duties, etc., of trustees in relation to the estates, assets, etc., of the insolvent, are contained in a few words of section twelve, which are as follows:—

"And such trustee or trustees may sue both at law and in equity in his and their own name, for and upon all causes of action for the benefit of the insolvent estate, in the same way as the insolvent might have done."

According to the plaintiffs' contention, the united effect of these several enactments may be formulated in a proposition consisting of three parts—(1) that the debt or liability incurred by the defendant under the 24th section of the Act of Incorporation is an "asset" or part of the "estate" of the bank, which (2) became vested in the trustees under section two of the Winding-up Act and the insolvency law; and (3), which the trustees may sue for under section twelve of chapter 90 of the Consolidated Statutes, entitled "Of Insolvency."

For the defendant it is not disputed that if the first of this proposition can be maintained, this debt or liability of the defendant is such an asset as would pass to and "vest" in the plaintiffs under the general words defining their rights, powers, etc.

The first proposition, however, is disputed. It is contended on the part of the defendant that the debt or obligation on the part of the directors of the bank arising out of the facts stated and under the provisions of section 24 of the Incorporation Act, is not an "asset" of the bank on the ground that the liability created by this section is not a liability to the bank which the bank could have sued for or recovered, and upon this single issue thus broadly and generally stated, it appears to us that the whole case turns.

Taking the exact words of section 24 the question in issue may be stated more precisely to be whether or not after the

TRUSTEES COM. BANK v. JAMES S. PIT

words "shall be liable" in the sixth line the words "t are to be regarded as inserted or to be understood.

The question for our determination appears to u tirely one of construction; or, in other words, wh legislature intend? And we think further that th must be determined upon broad and general principl regard to the general scope and purposes of the Ac have failed to derive much, if any, assistance from an ties that were or could have been cited.

Referring again to the exact words of the section i and contentions of the parties respectively, we may the interpretation claimed by the defendant to be t one, as expressing the intention of the Legislature, is, the words already quoted ("shall be liable") should b or understood "to the creditor to whom such excess i "with whom such excess of indebtedness has been co or to that effect.

After the fullest and most careful consideration, opinion that the construction of the words in question ded for by the plaintiffs, cannot be maintained, and al is not necessary that we should adjudicate definitely correctness of the defendant's construction, we are als nion that his interpretation more correctly expresses tl tion of the Legislature as being consistent not only whole scope and pnrpose of the Act, but also with t meaning of the language of the section in question.

The object of the provision in question was obvio protection of the interests of the creditors of the ins against the damages arising from unlimited transactions i tain kinds of business, and probably in particular aga notes of the bank itself to an excessive amount. To de directors for the time being from transgressing in thi cular it was enacted that as a consequence of such off their part they should be made personally liable for t gation which they, or rather the bank under their manag should contract in excess of the prescribed limits.

This statement of the object of the provision in questi gests two principles which evidently were intended to c in its application, (1) that the remedy provided by the was intended to be prohibitive and preventive of the c rather than merely consequential or incidental; and (2) t make such a remedy effective it must be continually and times immediately available to those for whose benefit o section it was intended.

In construing this act it must be further kept in view that the contingency of a winding up of the bank before the expiry of the term of its charter, on account of insolvency, is not contemplated or provided for, and that the provision in question in this case contemplates and was to be applied to the bank as a going concern; that it was not intended primarily as a means whereby in the event of insolvency a deficiency in the assets was to be made up, but on the contrary, in the absence of any provision or machinery for a general winding up, distribution, etc., to afford to parties having dealings with the bank protection at all times against loss from this particular kind of misconduct on the part of the directors.

The plaintiff's construction of the words in question entirely fails to satisfy these requirements. Under that construction the remedy would be entirely useless and unavailable so long as the offenders, i. e., the offending directors, remained in office, and the further anomaly would then arise that the offenders themselves, who had violated the provisions of the Act, would have a direct interest in defeating the object of the Act by keeping themselves in office, and be open to the temptation to further misconduct in order to accomplish that purpose. The construction contended for by the defendant is free from these anomalies and defects, and harmonizes with the general scope and purpose of the enactment as above stated.

In the practical application of the plaintiff's construction another anomaly would arise which the Legislature could not possibly have intended. In the present action, for example, in order to recover against the defendant, the onus rests upon the plaintiffs of proving the excess of indebtedness on the part of the bank over a certain amount. In such an action, whether at the suit of the bank or as in this case, of its trustees, it might reasonably, and even probably occur that a large part or proportion of the alleged liabilities of the bank were disputed and resisted by the bank. In that event, in order to establish the claim against the offending directors, on the footing of an indemnity or of damages, as contended for by the plaintiffs for having contracted the excess of liability prohibited by the statute, the bank would be placed in the anomalous position of having to prove in one action the existence of a claim or claims against itself, which claim or claims they themselves were disputing and repudiating in other proceedings.

A closer examination of the precise words of the section, and their strict and technical meaning will, we think, further show the plaintiff's construction to be untenable.

The words are "the total amount of the debts which the corporation shall at any time owe * * * shall not exceed, etc., and in case of any excess, the directors, under whose, etc., shall be liable for such excess in their individual and private capacities, etc."

As to the meaning of the word "liable," which is the central point at issue, the plaintiffs contention is that the liability to the bank is in the nature of penalty or damage for a wrong done to the bank, or by way of indemnity to the bank against loss, actual or possible, arising from the commission of the prohibited Act. In other words, a new cause of action, which is not the debt itself (or "excess" of debt, which is the same thing as regards its legal effect) is intended to be created, upon new and different grounds, and between parties, the difference as to parties being so complete that the debtor or defendant in the one case (i. e., the bank) becomes the creditors or plaintiff in the other, and both of these entirely different causes of action and the resulting antagonistic positions arises according to the plaintiff's contention, at the same instant, and *ipso facto* out of the same act, i. e. the contracting of the prohibited debt (or excess). We think such interpretation is not consistent with the strict and legal effect of the words of the section, nor with their broad and obvious scope and intention, and that if the intention were such as the plaintiff contends for suitable and entirely different language would have been used to express that intention.

No new cause of action for which the debtors could be "liable" is created by any express words of the section, nor does it appear to us that any implication to such an effect is to be presumed or even warranted.

The only cause of action appearing or referred to in the section to which the word "liable" could refer, and to which it in fact does refer, is the debt itself, or the excess of debts which the bank shall owe, "and for such excess" and for that cause or ground of action only the directors are to be "liable." The words "debt" not only states the cause of action itself, but includes by plain implication at least the party to whom the cause of action accrues, i. e. the person to whom the "debt" is "owed" or due. This is not merely the strict and technical effect of the particular words in question, but it also conveys their common sense and ordinary conventional meaning. To state that if a person contracts, or is a party to the contracting of a debt (in the name of another) he himself shall be or thereby become

"liable" for that debt, conveys to the ordinary reader as well as the lawyer the meaning that the liability intended is to or towards the person to whom the debt is due; he the creditor as well as the debt being ascertained and the only new or substantive effect produced by the statement being to point to a new or additional debtor or party liable, as the case may be.

In the present case we think that the words in question in their strict and technical sense convey the same meaning and intention as they would to an ordinary reader in their every day sense. We think that in substance and effect the legislature meant to say, as it were, to the directors, "you are not to contract debts of a certain kind beyond a certain amount. If you do, you thereby and *ipso facto* make yourselves personally liable for the debts themselves, and to the creditors or parties with whom the debts are contracted," and we think that in their strict and technical sense the words "shall be liable" for such excess are sufficient to give effect to that meaning, and that the words "to the creditors" or "to the parties to whom such excess is due or owing," or words to that effect, are plainly intended and implied to be read as it were into the sentence, as being in entire harmony with the meaning of the other parts, and that the omission of such words by the legislature is to be accounted for on the supposition that they were considered as being mere surplusage and unnecessary. The construction contended for by the plaintiff is further weakened, and that of the defendant strengthened upon view of the proviso forming the concluding portion of the section, "provided always that the lands * * * goods and chattels of the corporation shall also be liable for such excess."

These words plainly suggest two observations: (1) the words "also liable" give strength to the contention which we have already accepted as correct that the liability, as regards its origin and the party to, or towards whom it accrues is for the same cause of action, and to or towards the same party. (2). The plaintiffs right to sue for a debt or cause of action due or accruing to the bank, arises under the provisions of the Insolvency Act and the Winding-up Act vested in the "estate" and "effects" and "assets" of the bank in the trustees, and the plaintiffs, as we have already seen, vest their claims in this action on the ground that this debt or "liability" on the part of the directors is an "asset," or part of the "estate" and "effects" of the bank vesting in them. If that construction be accepted as correct, it must follow that, even for the sake of argument

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the debt or liability or "chose in action," as it may not be a part of the lands, goods and "chattels" within the strict meaning of the proviso, yet by a the amount from the directors, it would become part of the "goods and chattels," and there would then be no question of the proviso, or at least in the word "also."

Without adding further reasons, we think it sufficient that there being, to our minds, no question of law or principle at issue, except such as apply to the construction of the statute, and the question raised in this case being entirely the proper construction to be placed upon the provisions of the statutes under consideration, we are of opinion upon only of the particular words which have formed the point of discussion, but of the whole scope and object of the Commercial Bank Incorporation and Winding-up Acts, that the plaintiffs' construction, that the personal liability on the part of the directors for the "excess of debts" "owing" by the bank was intended to be a liability to the bank, and was a liability to the bank, or a "chose in action" of the bank, cannot be maintained and that therefore such debt or liability is not a part of the "estate" of the bank vesting in the trustee under the Winding-up Act, and that therefore the judgment of the court must be in favor of the defendant with costs.

Mr. Emerson, Q. C., Mr. Johnson, Q. C., and Mr. Morrill for plaintiffs.

Mr. Morine and Mr. H. E. Knight for defendant.

TRUSTEES UNION BANK v. TRUSTEES COM. BANK

1896, December. BY THE COURT.

REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.

Insolvency—Banker and customer—Moneys entrusted for collection—Trustee's liability to repayment out of estate.

Where moneys are entrusted to a banker to collect and pay the same over to a customer, and in the event of the insolvency of the banker before the moneys have been paid over payment may be demanded out of the estate.

This case was argued on a summons taken out by the trustees of the Union Bank, but as all the material facts are set out in the judgment it is unnecessary to state them so here.

MR JUSTICE LITTLE delivered the following considered judgment of the court:—

The contentions in this case were brought before me on a summons granted upon the application of the plaintiffs, who claim from the defendants the sum of \$5,339, together with interest from the 2nd day of June, 1894. The amount claimed is alleged to have been received by the Commercial Bank as agents and trustees of the plaintiffs from Mare, Holmwood & Co., of London

From the documentary proofs and the evidence of parties examined at the trial, it would appear that on the 9th day of February, 1893, an agreement was entered into under which Mare, Holmwood & Company assigned to the Union and Commercial Banks a debt owing to Mare, Holmwood & Co. of £102,825 by the late firm of P. & L. Tessier. In consideration of this assignment the banks were to take up and retire all acceptances of Mare & Holmwood of Tessier's drafts then running, and to relieve the former of all personal liability on account thereof. They also assigned to the banks all sums accruing in respect of shipments or cargoes pledged to them (Mare, Holmwood & Co.) by Tessier, and all other securities held in respect of their account with them. Among other provisions it was also agreed that Mare, Holmwood & Co. would pay the banks the sum of £6,000 by yearly instalments in such manner as the banks should direct. For the conveniences and to facilitate the transmission of any such amounts it was arranged between the banks that the instalments should be received by the Commercial Bank, who would hand over the proportionate part of such amount to the Union Bank.

In pursuance of this arrangement the Commercial Bank received, on the 30th April, 1894, the first instalment of £1,112 6s. 3d stg., and in July following paid over to the Union Bank their proportion of that amount, together with the interest that accrued on it. On the 2nd June, 1894, the Commercial Bank had received another instalment, but failed to inform the Union Bank of such receipt, and it was only after the suspension of both banks in the following month of December and after the appointment of these liquidators they ascertained by direct communication with Mare, Holmwood & Co. that such a payment on account of their bank had been made to the Commercial. Under this condition of facts and circumstances the defendant trustees, admitting the receipt of the amount now claimed, deny their liability to pay it over in

full, contending that the plaintiffs are only entitled to a dividend thereon as ordinary creditors of the bank. The question then arises as to whether there was such fiduciary relation existing between the two banks in connection with this particular transaction as to take this claim out of the ordinary class of claims that exist between debtor and creditor or between banker and customer.

We find the defendant bank had agreed to receive for and hand over this money to the plaintiff bank, and had so acted on receipt of the first instalment, but instead of following this straightforward course in the second instance received the amount and very probably applied the money to the purposes of its own business. Now, out of the agency thus undoubtedly existing between the parties, I hold a trust was imposed upon the Commercial Bank in receiving this money to pay over the moiety of it to the Union. That agency and trusteeship having been acknowledged, accepted and acted upon, no subsequent abuse of the trust could alter that relationship or confer rights on the party abusing it nor on those who claim under him or them. The neglect for such a length of time, intentional or otherwise matters not, to inform the Union Bank of the receipt of the money and the wrongful use of it by the agent in his own business should not, and under authority as I submit, do not prejudice the rights of the present claimants.

I do not consider that the case calls for many or any extended quotations from or references to authorities on the subject of agency or trusts, but there is one short case which might be given in full, as I consider it fixes the position of the parties here and fits into this case in its main points. I refer to the case *ex parte Plitt* found in 37 *W. R.*, p. 463.

In that case it appeared that the bankrupt carried on the business of a banker and money changer, and the applicant was in the habit of going to him at times to obtain change for foreign monies, and to request him to collect cheques on his account which he had received as agent for persons abroad. The applicant one time had received on behalf of his principal a cheque on the London Joint Stock Bank for £154 3s. 4d., and on the same day handed it to the bank for him to hold it on his account and for collection. The bankrupt paid this cheque into his own account at Barclay's Bank and received its proceeds; the applicant was subsequently paid by the bankrupt some £23 in two payments, leaving in his hands about £130 at the time of his bankruptcy. This sum the applicant

claimed to be paid out of the estate. Under these circumstances Mr. Justice Cave briefly gave judgment as follows:— In his opinion the relation between the parties was not the ordinary relation of banker and customer; where that existed it followed that the banker can use the money of the customer, and nothing is created but a debt from the banker to the customer. This case is a different one, *i. e.*, if money be given to a man to take care of it does not justify to employ that money and become the debtor of the person who has entrusted it to him. The case of a banker and customer is otherwise, where the bank uses the customer's money. He consequently held that the applicant was entitled to recover from the estate the full amount of the balance claimed.

The case must be regarded as on all fours with the present.

The Union Bank cannot be regarded as having been a customer of the Commercial in the sense in which the term is applied in the reports, nor of having deposited the amount with it. It was not received as a deposit or for any other purpose or object than to be accounted for, and on receipt paid over to the Union. The facts in the case cited and here are not identical, as a matter of course, though there is this distinction as to facts, in principal there is none. The Commercial Bank may have used the money so received in its own business, but that circumstance, as will be seen, did not vary or extinguish the obligation entered into with the Union. In making such use of the money a wrong was done and the silence observed about its receipt only aggravated the evil; but, as already observed, "an abuse of the trust confers no rights on the party abusing it." It is as well to give place now to a few citations from another authority on the doctrine governing in cases analogous to the present. These few extracts are from the clear and exhaustive judgment of Jessel, M. R., in *re Hallett's Estate*, reported in 49 *L. J. Ch.*, 415. We find that before analyzing the reasons given by Mr. Justice Fry in his judgment in the case of *Ex parte Dale & Co.*, *L. R. 11, Ch. Div.*, 772, the master of the rolls asks does it make any difference that instead of trustee and *cestui que trust* it is a case of fiduciary relationship? What is a fiduciary? It is one in respect of which if a wrong arise the same remedy exists against the wrong doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. It follows, he goes on to state, from that interpretation that when money coming from the trust lies in the hands of persons standing in that re-

lationship it can be followed and separated from any money of their own. He asks "Has it ever been suggested until very recently that there is any distinction between an express trustee or an agent or a bailee or a collector of rents or anybody else in a fiduciary position? I have never heard until quite recently such a distinction made." We may for the present be satisfied with one other extract from this judgment and conclude further observation on this matter.

In his critical and learned observation on the judgment delivered by Lord Ellenborough in the case of *Taylor vs. Plumer*, 3 M. & S., 562, the Master of the Rolls observes that Lord Ellenborough lays it down "that it makes no difference in reason or law into what other form different from the original charge may have been made * * * the difficulty which ultimately arises is one of fact and not of law, and the *dictum* that money has no ear-mark must be understood as predicated only of an undivided and undistinguishable mass of current money. On this the Master of the Rolls observes * * then again he did not know that equity would have followed the money even if put into a bag or into indistinguishable mass by taking out the same quantity. In all of the *dicta* laid down in that judgment more than sufficient material will be found to enable one without any hesitation to find in favor of the plaintiff in these proceedings, and without further comment on the principle involved I give judgment in favor of the plaintiff.

Mr. Greene, Q. C., and Mr. H. E. Knight, for plaintiffs.

Mr. Johnson, Q. C., and Mr. Morris, Q. C., for defendants.

1896, *December*. BY THE COURT.

REPORTED BY JAMES M. KENT, BARRISTER-AT-LAW.

Trustees—remuneration for services—residue—agreement—estoppel.

The insolvent estate of Steer paid dividends to the amount of fifty cents in the dollar, when an agreement was entered into whereby the creditors accepted a further dividend of four cents in the dollar in lieu of a realization and distribution of the residue. All parties interested, including trustees of Commercial Bank, consented to this arrangement, and Steer was granted his certificate of insolvency and final discharge. Steer's trustee retained an amount for commission to which the trustees of the Commercial Bank objected, and brought the present proceedings to have the said amount distributed among the creditors of Steer.

Held—That the trustees of Commercial Bank were not estopped from questioning the claim of the trustees of Steer by reason of the above arrangement.

THESE proceedings were taken by the trustees of the Commercial Bank of Newfoundland by petition, wherein it is prayed that the trustees of the insolvent estate of John Steer be ordered and directed to distribute among the creditors of the said John Steer the sum of \$7,757.36, or that such order be made for the ascertaining of the amount of compensation as the court may deem meet to be allowed to the said trustees of John Steer's estate. The circumstances under which this claim is made are as follows:—In March, 1895, John Steer, of St. John's, merchant, was declared insolvent, and John T. Gillard and Henry J. Stabb were appointed trustees. Up to February, 1896, the said trustees had realised and distributed the effects of said insolvent to the extent of fifty cents in the dollar, when a small residue of the estate remained unrealized. It was accordingly agreed upon, with consent of all the creditors of Steer, that in lieu of this small unrealized residue the said creditors would accept a further dividend of four cents in the dollar, payable in instalments. In April, 1896, with the consent of the trustees of the Commercial Bank and all other creditors, a certificate of insolvency and final discharge was given to the said John Steer by the court. The said trustees of John Steer filed their accounts of the said insolvent estate, wherein it appeared that they had retained without application to the court a sum of \$7,757.36 as compensation for their services. The trustees of the Commercial Bank, being dissatisfied with the amount, after communication with the said trustees of Steer, took these proceedings.

Mr. Justice Little delivered the following judgment of the Court (consisting of Little and Winter, J. J.):—

Having fully considered the arguments of counsel upon the question arising in this matter, we are of opinion that the creditors are not estopped from questioning the claim of defendant trustees by reason of the deed or agreement entered into between the plaintiff trustees and the creditors and Mr. Charles Steer for the payment of an amount for a further dividend in consideration of the assignment to him of the then residue of the insolvent estate. We shall not, at present, enter into the statement of any of the reasons inducing us to adopt this view; but it may be observed that we do not regard the word residue used in the deed as intended to cover any amount that might be allowed or deducted from the charges for commission. It was shown in evidence so far that the statement of accounts of the affairs of the insolvent estate, stated to have been furnished the plaintiff trustees before the execution of the assignment, contained no charge for this commission or any reference to it. We are therefore prepared to hear testimony, if the defendants wish, to support their claim for the rate of commission charged by them in their accounts with the creditors.

Mr. Johnson, Q. C., for trustees Commercial Bank.

Mr. Greene, Q. C., and *Mr. H. E. Knight*, for trustees of Steer.

APPENDIX.

APPENDIX

[PRIVY COUNCIL.]

THE GOVERNMENT OF NEWFOUNDLAND AND THE NFLD. RAILWAY COMPANY AND OTHERS.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

*Contract—Apportionment—Counter-claim for Unliquidated Damages—Set-off
against Assignees of the Contract.*

By contract in 1881 embodied in a statute plaintiff company covenanted to complete a railway in five years, and thereafter to maintain and continuously operate the same. In consideration thereof the Government covenanted:

(a) to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, such subsidy "to attach in proportionate parts and form part of the assets of the company as and when each five-mile section is completed and operated ;"

(b) to grant to the company in fee-simple 5000 acres of land for each one mile of railway completed, on completion of each section of five miles.

It appeared that the company completed a portion of the line, and received from the Government on the completion of each five-mile section the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto; thereafter the contract was broken by the company and the Government refused further payments.

In a suit by the company and its assignees of a division of the railway and of the rights relating thereto:—

Held—(1) That on the true construction of the contract (a) each claim to a grant of land was complete from the time when the section which earned it was complete; (b) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation ;

(2), that by the law of the colony the Government were entitled to set-off a counter-claim for unliquidated damages for the company's breach of contract in not completing the line ;

(3), that the set-off availed against the assignees of the company, the claim and counter-claim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined.

Young v. Kitchen (3 Ex. Div. 187) approved.

APPEAL from a decree of the Supreme Court (Jan. 5, 1887) in a petition in the nature of a petition of right brought by the respondents in the said Supreme Court against the Government of Newfoundland under the provisions of consolidated statutes of Newfoundland, tit. 4, c. 29.

The petition was by the respondents to recover the arrears of an annual subsidy and certain lands which the respondents claimed under a contract made between the Government of Newfoundland and the Newfoundland Railway Company.

The facts and proceedings are stated in the judgment of their lordships.

Rigby, Q.C., and Buckley, Q.C. (Munro, with them), for the appellants, contended that according to the true construction of the contract the right of the railway company was determined, either to call for further payments of the subsidy or for the grants of land. The railway had not been completed within the time fixed. The company was not bound to grant a proportionate or any part either of the subsidy or land on completion and operation of every five-mile section. The subsidy was for an entire sum, and the condition precedent to payment was the complete fulfilment of the contract. There had been no completion and continuous operation of the line either in whole or in part, within the meaning of the contract. The interest taken by the assignees was similar to that of the assignors, and liable to be defeated by the company's failure to observe the terms and conditions of the contract. The appellants, if liable on their contract, were entitled to counter-claim against the company for their breaches of contract, and such counter-claim or set-off was good against the assignees. See *Roxburghe v. Cox*, 17 Ch. D. 520; *Young v. Kitchen*, 3 Ex. D. 127.

The Attorney General (Sir R. Webster) and Sir Horace Davey, Q.C., (J. D. Fitzgerald, with them), for the respondents, contended that by the true construction of the contract the railway company did not forfeit their right either to the subsidy or to the grants of land by reason of their non-completion of the whole line within the time limited. The company was entitled to recover in respect of the portion of the railway which it had completed. What the respondents, that is, the company or its assignees, were entitled to was payment of the proportionate parts of the subsidy and the grants of land which were attributable to the completed parts of the railway. The assignees, moreover, were not affected by any counter-claims by the appellants. Set-off is a question of procedure. You may set off in an action inter partes, not in an action by third parties who are entitled to sever their claim from the rest of the contract, when the claim is a completed one, notice of the severance and assignment having been given to the debtor.

Reference was made to *Rawson v. Samuel*, 1 Cr. & P. 161, 178; *Smith v.*

Parkes, 16 Beav. 119; *Watson v. Mid Wales Railway Company*, Law Rep. 2 C. P. 593; *In re Milan Tramways Company*, 22 Ch. D. 122, S. C. 25 Ch. D. 522; *Harter v. Coleman*, 19 Ch. D. 630; *Bradford Banking Company v. Briggs*, 12 App. Cas. 29.

Buckley, Q.C., replied, citing *Mangles v. Dixon*, 3 H. L. C. 702.

1888, Feb. 7. The judgment of their lordships was delivered by

LORD HOBHOUSE:—

In this case, the defendant is the Government of Newfoundland. The plaintiff company was incorporated for the purpose of constructing and working a railway in pursuance of a contract with the Government, for which the Government undertook to pay a subsidy and to make grants of land. The other plaintiffs, as trustees for bondholders of the company, are assignees of a portion of that railway, of whatever right the company have to the subsidy, and of the grants of land in respect of such portion. The plaintiffs contend that the Government is bound to pay a certain amount of subsidy and to make grants of land for a completed portion of the railway, though as a whole it is not completed. The Government denies the liability, but, if it exists, sets up certain counter-claims against the company.

The precise points in issue are explained in a series of questions which, by consent of the parties, were submitted for the judgment of the court before going into evidence upon questions of fact, and which it is convenient to set forth. The questions are:—

1. Whether by the non-completion of the whole railway within the time stipulated, the company forfeit their right to the payment of the subsidy in respect of so much of the line as is complete and operated?
2. Whether by the non-completion of the whole railway within the time stipulated, the company have forfeited their right to grants of land in respect of the completed portions?
3. Are the trustees for the bondholders, the petitioners Evans and Adamson, entitled to have payment made to them, or to the company on their behalf, of the proportionate parts of the subsidy attributable to the completed parts of the railway so long as the same are operated, even though the company be in default as to the completion of the whole line, and the Government may have a good claim for damages against the company in its corporate capacity?
4. Are the trustees for the bondholders, the petitioners Evans and Adamson, entitled to have the grants of land attributable to the

sections of railway already completed made to them or to the company on their behalf, even though the company be in default as to the completion of the whole line, and the Government may have a good claim for damages against the company in its corporate capacity?

5. Whether, if the first question is decided in favor of the petitioners, the Government can set-off or counter-claim against the claim of the petitioners to the subsidy any claims by the Government against the company?
6. Have the defendants the right in these proceedings to make set-off or counter-claim as in their answer they do?
7. If such set-off or counter-claim be valid as against the railway company, is it valid as against the other plaintiffs, the trustees for the bondholders?

The Supreme Court answered all the questions in a sense favorable to the assignee plaintiffs. Upon this it was unnecessary to debate any questions of fact, and on the 5th of January, 1887, the court decreed that the Government should pay the proportion of subsidy, and should make the grants, mentioned in the decree. From that decree the Government has appealed. The question turns entirely on the application to the events which have occurred of the provisions of an act of the Newfoundland legislature, which embodied a contract between the Government and a syndicate organized to construct the railway, and also a charter of incorporation for the company.

The act was passed on the 9th of May, 1881. It shews that the Government had intended itself to construct the railway, and had in the preceding year obtained the requisite powers from the legislature; but afterwards it was thought more desirable that the work should be done by a company, and a contract had been made for the purpose with the parties afterwards incorporated. It then ratifies the contract, and sets it out at full length.

The contract bears date the 20th of April, 1881. By paragraph 1 the company covenants to locate, construct, equip, maintain, and continuously operate 340 miles of railway, commencing at St. John's and running to Hall's Bay, with certain connections and branches, and to provide stations and other essentials necessary to the efficient operation of the road, at such places as will best accommodate the public and the shipping interests of the country. And by paragraphs 10, 11, and 12, it is provided that when the line is completed the company shall have a specified minimum of plant and equipment; that it shall furnish more as the business develops, so that the travel and shipping interests of the country may be fully ac-

commodated; that it shall efficiently and continuously operate the lines; that there shall be at least one passenger train each way each day over the whole line; that it shall provide the Government with all necessary facilities for transporting mails over the line, attaching a mail car to each through daily passenger train each way.

The most material paragraphs are 13 and 14, which run as follows:—

“13. The said railway and branch lines shall be completed and in operation within five years from the date of this contract. In consideration of the premises, and of the due and faithful performance by the said syndicate company of all and singular the covenants and agreements herein contained on their part to be performed, the Government of Newfoundland covenants and agrees:—

“14. To pay the syndicate company, upon the construction and continuous efficient operation of the line, a subsidy of \$180,000 per annum, in half-yearly payments, in gold, in London, England, on the 1st day of January and the 1st day of July in each year, for a period of thirty-five years; such annual subsidy to attach in proportionate parts and form part of the assets of the said company, as and when each five-mile section is completed and operated, or fraction thereof, at terminus at Hall's Bay.”

Then follow, under the heading of “Grants of Land,” several paragraphs relating to that subject. The first sentence of paragraph 15 is the most important, and is as follows:—

“Grants of Land.”

“15. The Government to grant in fee simple to the syndicate company 5000 acres of land for each one mile of railway completed throughout the entire length of 340 miles. The said fee simple grant of 5000 acres of land per mile to be made to the said syndicate company upon completion of each section of five miles of railway, or fraction thereof, at the terminus of Hall's Bay.”

In the rest of paragraph 15, and in paragraphs 16 and 17, are contained provisions for ascertaining the lands to be granted.

By paragraph 20 it is stipulated that all land necessary for the railway shall be provided by the Government, who may, to recoup themselves, retain \$90,000 out of the last annual subsidy.

Paragraph 22 is as follows:—

“22. The said syndicate company, within three months after the execution of this contract, shall deposit with the Government of Newfoundland, as security for the performance of this contract, bonds

of the United States of America, or other approved securities, in amount equal to \$100,000, the same to be returned to the said syndicate company upon completion of the 340 miles of railway; the interest in the meantime shall be paid to the said syndicate company."

By paragraph 28 the Government takes power to purchase, at any time after the expiration of thirty-five years from the date of the contract, the property and rights of the company in the lines of railway, and all property belonging to the company in the island.

The incorporation of the company with proper provisions is stipulated for by paragraph 20 of the contract, and by a schedule attached to it; and by sect. 2 of the act it is enacted that, for the purpose of incorporating the individuals described, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the schedule shall have force and effect as if it were an act of the legislature, and shall be an act of incorporation within the meaning of the contract.

On the 15th of July, 1882, the company assigned to the other plaintiffs the southern division of the railway and its entire plant and undertaking, constructed or to be constructed, being a distance of 100 miles, and all rights relating to that division or branches, including the grant of 5000 acres of land for each mile of railway forming part of that division or branches, and also all interest of the company in respect of the said division or branches in the subsidy of \$180,000 payable by the Government in accordance with the provisions of the said act. The assignees were to hold the property assigned for the security of persons holding bonds which under the powers of the act the company were about to issue to an extent not exceeding £400,000. It appears that bonds have been issued to the full extent.

On the 20th of April, 1886, the railway should, according to the contract, have been completed. At that time the company had only completed eighty-five miles, or seventeen of the five-mile sections; and it must be taken for the purposes of the present questions that no more has been done, or ever will be done, by the company. It does not appear when any five-mile section was completed, but as each has been completed the parties have considered that a proportionate part of the subsidy attached, and the Government has begun paying that proportion on the next half-yearly day of payment. On this footing the amount due on the first of July, 1886, was seventeen sixty-eighth parts of the whole. But by that time the company had failed to perform their contract, and the Government refused to pay any more.

Certain admissions have been made in the suit, by which it appears that the country through which the portions of the completed railway run are much more densely peopled than the country in which no work has been done.

Their Lordships now address themselves to the questions in the suit. As regards the grants of land, they feel little difficulty. It does not appear quite clearly what has been done with respect to these lands, but the argument has proceeded on the footing that in some cases grants have been completed; in some the company has selected blocks (as by the contract it has a right to do), but no grants have been made; and in the rest there has been no selection of blocks.

In their Lordships' view the contract is not so framed as to make the grants of land dependent in any way on the completion of the whole line, or upon anything but the completion of each five-mile section. As each of those sections was completed, the right to 25,000 acres of land became perfect. The company has time allowed to select its blocks, but may if it pleases make the selection at once. There may, or rather must, be delays in selection, in negotiations after selection, and in the formalities of conveyance. But their Lordships think that it would not be in accordance either with the object for which grants of this kind are intended, viz., the immediate attraction of settlers, or with the frame of the contract, if they were to hold that the perfect right which the company has gained on completion of each section is lessened by such delays. Indeed, the appellants' counsel agreed that it would be wrong to interfere with grants already completed, contending only that the Government is not bound to do anything more than has been done, or at all events that its counter-claims may be enforced in incomplete transactions. Their Lordships hold that each claim to a grant must be treated as complete from the time when the section which has earned it was completed.

The questions relating to the subsidy are much more difficult. It is argued for the Government that the contract is for the whole railway as an entire thing; that it is to serve the travel and shipping interests of the whole tract of country in contemplation; that the provisions relating to plant and efficient operation refer always to the whole and never to a portion; that no part of the contract contemplates the completion of part and the abandonment of the remainder; that in fact the company has only taken up the most lucrative portion; that, under the express words of paragraphs 13 and 14, the construction of the entire line is a condition precedent to the payment of the subsidy, and the efficient operation of the line is a condition precedent to the payment of each instalment; that the subsidy also is treated as an entire thing; and that on the 20th of April, 1886, the condition was broken and nothing was payable.

viii THE GOVERNMENT OF NFLD. AND THE

Undoubtedly these arguments have great force. The contract assumes throughout that the railway will ultimately be completed; it nowhere contemplates the partial completion and partial abandonment; and there is always much difficulty in applying the terms of a contract to a state of events which the parties have never had in their minds. But their Lordships think that the last provision of paragraph 14 requires more effect to be given it than the arguments for the Government allow. Indeed, if pushed to their logical conclusion, they would deprive that provision of all substantial effect. If the subsidy is so entire a thing that it cannot be severed, the whole must begin and end at the same time. No part of it could be payable till the completion of the whole railway: and, as on the 20th of April, 1886, only part was completed, nothing would be payable at any time.

The Government certainly have not acted on this view, and their counsel shrank from pressing it at the bar. They argued that, though it may be right to pay the amount of subsidy earned during the currency of the five years, yet when that term had expired, and the conditions precedent were irretrievably broken, the case was altered, and it became right to insist upon the entirety of the contract.

Upon this their Lordships think that the expression "to attach in proportionate parts and to form part of the assets of the company" imports a permanency of interest greater than would be satisfied by the currency of the subsidy for two or three years or a few months, as the case might be. Further, it is clear that the theory now under consideration breaks up the unity of the subsidy. If, for example, a proportionate part commenced in 1883, it would end in 1918, whereas other parts would run on later up to the year 1921. But when once we abandon the unity of the subsidy, it is a question only of degree how far the contract requires it to be abandoned. To put the matter briefly, if nothing is payable immediately after the completion of a five-mile section, the last sentence of paragraph 14 is reduced practically to a nullity; if anything, the subsidy loses its unity, and becomes a number of subsidies payable for different periods.

Feeling as they do the impossibility of reconciling all parts of this contract, their Lordships give it the best construction they can, and they conclude that the provision with regard to five-mile sections has the effect of relaxing the extreme stringency with which the rest of the contract would bear upon the company; and that, on the completion of each section, one sixty-eighth part of the whole subsidy became payable as a separate subsidy, beginning at the next day of payment and continuing for thirty-five years, though subject to the condition of continuous efficient operation.

Then comes the question of counter-claim. Whether the Government can establish any has not been ascertained. But it is clearly conceivable that they may shew damage arising from the non-construction of the railway, whether by the delay, or by being left to provide for the more sparsely peopled country while paying for the railway working among the more densely peopled a subsidy calculated on an estimate of the whole, or by having purchased land now rendered useless, or by the withdrawal of the \$100,000 security under circumstances which are not in evidence. If they have claims of this kind it would clearly be a great hardship on them to be unable to relieve themselves pro tanto from the payment of the subsidy.

The Colonial Legislature has adopted the convenient and just rule introduced into England by the Judicature Act, so that damages unliquidated at the time of the action may be made the subject of counter-claim. And the plaintiffs do not deny that, as between the Government and the company, such counter-claims may be set up, but they contend that the assignment of July, 1882, has altered the position of all parties, and that, as against the plaintiff assignees, the counter-claims cannot be set up.

As regards hardship on the Government, it is precisely the same in kind whether its claims are disallowed as between it and the company or as between it and the assignees; though the extent of hardship might be less in the latter case, if the assignees find that the bonds are wholly or largely made good by the proceeds of the railway and of the 425,000 acres of land attached to it. But the question is to be decided, not on grounds of hardship, but on principles of law and the decisions which illustrate them.

The assignees, indeed, contend that the Act of 1881 and the company's charter contain provisions which, in any controversy with the Government, place them in a better position than the company. The charter contemplated that the company will borrow money, and says that it may do so, and may issue bonds upon the faith of the corporate property. But their Lordships cannot find any indication throughout the whole of the documents which should lead a lender of money to think that the corporate property is anything more than the company may justly claim, or that he is in any other way to stand on higher ground than the borrower.

But then it is said that the rule of law deducible from the authorities is, that when a debt or claim under a contract has been assigned and notice given to the debtor, which may be assumed to have been done in this case, the debt or claim is so severed from the rest of the contract that the assignee may hold it free from any counter-claim in respect of other terms of the same contract. So, at least, their Lordships under-

stood the argument. And as such a limitation of the right to set off a counter-claim is new to them, they are led to examine carefully the cases relied on to support it.

In *Watson v. Mid Wales Railway Company*, *Law Rep. 2 C. P. 593*, the material facts were as follows:—On the 18th of March, 1865, the company gave bonds to Watson in consideration of “work and labour.” Four days afterwards they demised to him their whole undertaking at a certain rent. He assigned his bonds to another company, who gave notice to the railway company. After the assignment rent accrued due to the railway company an action was brought on the bonds in Watson’s name against the railway company, who claimed to set off the rent. That claim was disallowed.

It was pointed out that Mr. Justice Willes examined the case to see whether there was any agreement that one debt should go in liquidation of the other, and that the balance only should be considered as the debt. And it was suggested that such an agreement was necessary to support counter-claims against assignees. But Mr. Justice Willes only entered upon that examination because the two debts had no common origin, and, in default of such an agreement, no connection with one another. The true principle is shewn by Bovill, C.J., in the following terms:—“No case has been cited to us where equity has allowed against the equitable chose in action a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it.”

It certainly cannot be said that the claim by the Government for non-construction of the railway arises out of matters not connected with the payment of the subsidy. On the contrary, the obligation to construct the whole is so intimately connected with the obligation to pay for a portion, as to give rise to a forcible argument that one is a condition precedent to the other; so intimately that their Lordships have serious difficulty in disengaging them, and can only do so by modifying the language of part of the contract.

The next case is that of *In re Milan Tramways Company*, *22 Ch. D. 122*. Hutter was a director of that company, and in the year 1879 he purchased the claims of several of its creditors. On the 12th of January, 1880, an order was passed for winding up the company. On the 5th of February a charge was made against Hutter for misfeasances as a director. On the 26th of February he assigned to one Theys the claims against the company which he had purchased. On the 31st of May Theys took out a summons to be admitted as a creditor on those claims. On the 25th of July Hutter was found guilty of misfeasance and ordered to pay a sum of £2000. It was sought to set off this sum against Theys’ claim. Mr. Justice Kay rejected the set-off, and said that the case fell within Chief

Justice Bovill's judgment in *Watson's Case*, *Law Rep.* 2 C. P. 593. The Court of Appeal confirmed that decision.—25 Ch. D. 522. In their judgments, Cotton and Fry, L.JJ., both point out that Theys was enforcing claims, not of Hutter, though the right to them was for a time vested in him, but of other creditors; and that there were no cross demands between Theys and the company. It is obvious, indeed, that the two demands were of totally different origin, and that no connection was ever established between them.

In the case of *Bradford Bank v. Briggs & Co.*, 12 App. Cas. 29, the defendants, Briggs and Co., had by their articles of association a first charge upon the shares of their shareholders for all debts due from them. Easby was a shareholder, and in November, 1879, he gave to the plaintiffs, the bank, a charge for future advances. Notice of the charge was given to the defendants, who did not give any notice to the bank of their charge till June, 1881. It was held that advances made by the bank on the faith of their charge took priority of Easby's debts to the company contracted after the notice given by the bank.

The only difficulty in this case arose from the terms of the Joint Stock Companies Acts. Apart from that, the case exactly resembled the well-known case of *Hopkinson v. Rolt*, 9 H. L. C. 514, which settled the rules of priority as between a first mortgage for securing advances and a second mortgage, in respect of advances made by the first mortgagee after notice of the second mortgage. Lord Campbell there says, "The first mortgagee is secure as to past advances, and he is not under any obligation to make further advances. He has only to hold his hand when asked for a further loan." That was also the position of Briggs and Co. towards Easby.

The present case is entirely different from any of those cited by the plaintiff's counsel. The two claims under consideration have their origin in the same portion of the same contract, where the obligations which give rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another.

It is hardly necessary to cite authorities for a conclusion resting on such well-known principles. Their Lordships will only refer to *Smith vs. Parkes*, 16 Bear. 119, not so much on account of the decision as for the sake of quoting a concise statement by Lord Romilly of the principle which governed it. He says, "All the debts sought to be set off against the defendant Parkes are debts either actually due from him at the time of the execution of the deed" (this was the deed by which the third party who resisted the set-off was brought in) "or flowing out of and inseparably connected with his previous dealings and transactions with the firm." That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.

It appears to their Lordships that in the cited case of *Young v. Kitchen*, 3 E.L. D. 127, the decision to allow the counter-claim was rested entirely on this principle.

In stating this conclusion their Lordships confine themselves to the claims on account of non-construction. Much of the foregoing reasoning does not apply to the claim on account of the withdrawal of the security. When the circumstances of that transaction are ascertained, they may shew a fresh and voluntary dealing on the part of the Government raising wholly new obligations after notice of the assignment, and they may afford no ground for counter-claim against the assignees, even if they afford any against the company. That matter must be left for the Supreme Court to deal with when the facts are known.

It remains to say how the questions should be answered and the decree dealt with. Their Lordships propose to answer the questions as follows:

- (1) In the negative.
- (2) In the negative.
- (3) They are entitled, subject to such counter-claims pleaded in this action as may be established against them in fact and law.
- (4) In the affirmative.
- (5) They may counter-claim damages, as mentioned in answer to Question 3.
- (6) Such counter-claim may be made in these proceedings.
- (7) In the affirmative, so far as regards the non-construction of the railway.

Their Lordships think that the proper course will be to discharge so much of the decree below as directs the payment of the subsidy, and instead thereof to direct an inquiry whether the Government is entitled to make any and what claim against the company in respect of any of the matters mentioned in the answer of the Attorney General. Such an inquiry will embrace the subject of the \$100,000 security, though it is impossible, or at least very inconvenient, to deal with that subject in answering the questions. The method of inquiry, whether by action or issue, or before the Court itself, should be left for the Court to determine. The rest of the decree should be affirmed.

The subject of costs in the Court below need not be mentioned. As regards the costs of this appeal, each party has lost and won on a substantial point, and each must be left to pay their own costs.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion.

Solicitors for appellants: *Burn & Berridge.*

Solicitors for respondents: *George Davis, Son, & Co.*

[PRIVY COUNCIL.]

WALKER, DEFT; AND BAIRD AND ANOTHER, PLTFFS,
ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Prerogative—Treaties—Interference with private rights—Acts of State.

Quere,—Whether the Crown has the power of compelling its subjects to obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or whether interference with private rights can be authorised otherwise than by the legislature.

Where the Government justified certain acts, in derogation of the private rights of the plaintiff in regard to his lobster fishery, as acts and matters of state arising out of political relations between Her Majesty and the French Government, contending that they involved the construction of treaties and of a temporary *modus vivendi* for lobster fishing in Newfoundland and other acts of state, and that they were matters which could not be inquired into by the Court.

Held,—That this defence disclosed no answer to the action.

APPEAL from an order of the Supreme Court (March 18, 1891), to the effect that the appellant's defence did not disclose a sufficient answer to the respondents' action.

The statement of claim and defence are set out in their lordship's judgment.

The judgment of the Court below was that, in an action of this description, to which the parties are British subjects, for a trespass committed within British territory in time of peace, it is no sufficient answer to say, in exclusion of the jurisdiction of the municipal Courts, that the trespass was an "act of State" committed under the authority of an agreement or *modus vivendi* with a foreign power; and that in such a case, as between the Queen's subjects, the questions of the validity, interpretation and effect of all instruments and evidences of title and authority rest in the first place with the Courts of competent jurisdiction within which the cause of action arises.

The Attorney General (Sir R. Webster), Staveley Hill, Q. C., and A. T. Lawrence, for the appellant:—

The acts complained of were done by the appellant in pursuance of orders lawfully given to him by the Crown. Those orders were necessary for the carrying out of an agreement entered into by Her Majesty with a foreign power. Such agreement was a treaty made by Her Majesty by virtue of her prerogative and in lawful exercise thereof. As such it was binding on the respondents. Orders and acts necessary to carry the same into effect are acts and matters of state, and cannot be questioned in any of Her Majesty's Courts. The respondents were using and working their lobster factory in contravention of the treaty, and, in consequence, were committing unlawful acts. The duty of enforcing the due observance of the terms of the treaty had been delegated by Her Majesty to the appellant, and his acts in enforcing the same were not wrongful acts giving a cause of action cognizable by the Courts of Newfoundland.

The principle involved in the defence is this, that the Crown, by its prerogative, can bind its subjects by treaty; that it is an offence by the common law to disobey the provisions of a public treaty of this kind; and that the act of the executive in preventing that disobedience and enforcing obedience does not give a cause of action.

The only question triable in the case was, whether the act of the appellant was within the *modus vivendi* compact, and was justified and rendered lawful thereby; and that question was sufficiently raised by the defence. [LORD HERSCHELL:—Do you contend that every treaty can be carried out by the executive?] Not all; for instance, treaties involving questions of taxation or torts or cession of territory in time of peace. [LORD HOBHOUSE:—Can the Crown, by treaty with a foreign power, acquire new rights against its own subjects?] No; and it is not contended that the Crown can sanction an invasion by its officers of private rights in order to

carry out any kind of treaty. It can only do so when the treaty is to put an end to war or to prevent war ; and then the Crown has the power of compelling obedience to its provisions, on public grounds and for the public safety.

[The authorities cited were : 2 *Hen. 5*, c. 6 ; 29 *Hen. 6*, c. 2 ; 1 *Blackstone*, p. 257 (5th ed. 1773), c. 7, par. 2 ; *Comyns' Digest*, tit. *Prerog. D. 3*, and *Weymberg v. Tough*, 1 *Ca. in ch.* pp. 123, 173 ; *Chitty's Prerog. of the Crown*, pp. 166, 170 ; in *re Californian Fig Syrup Company's Trade-mark*, 40 *ch. D.* 620 ; in *re Carter Medicine Company's Trade-mark*, *W. N.* (1892), 106 ; *Kent's International Law* (2nd ed., 1878), p. 384 ; *Wheaton's International Law* (6th ed.), pt. 3, c. 2.]

In early times commissioners were appointed to inquire into breaches of treaty, Reference was made to *Molloy's De jure Marittimo*, bk. 1, c. ix., para. 7 ; *Dicey's Constitutional Law*, 8th Lect. (2nd ed.) ; *The Parlement Belge*, 4 *P. D.* 129, 5 *P. D.* 197. [LORD HERSCHELL :—Is there anything on the record to shew the compass of the treaty ? Those who drew the defence seem to have taken the widest view, viz., there is a treaty, and that puts an end to the action]. See *Damodhar Gordhan v. Deoram Kanji*, 1 *app. cas.*, 332, where the question of treaties of peace and war was discussed. [LORD HERSCHELL :—Is there any case which draws a distinction between those treaties which do and those which do not bind merely by the sanction of the Crown ?] No. It was stated that the Crown did not in this case dispute the right of the respondents to be compensated for the loss sustained by an act of State ; the contention was that the executive had a right to enforce obedience to treaties like the *modus vivendi* compact in this case.

Reference was also made to *Sutton v. Johnstone*, 1 *term.*, 493 ; *Feather v. The Queen*, 6 *B. & S.*, 257 ; *Money v. Leach*, 3 *Burr.*, 1742.

Sir J. S. Winter, Q. C., (Newfoundland), *J. E. C. Munro*, and *Arnold Herbert*, for the respondents :—

The judgment of the court below was right, for the defence admits the commission by the appellant of an act which, but for the alleged authority and ratification from Her Majesty, would be a tort. Further than that, the ratification itself is not set up as a justification in law of the act of the appellant, but it is alleged that that ratification involves questions or matters which cannot be inquired into by the court. But the right of Her Majesty to authorize an act committed by one subject towards another is a question which courts have jurisdiction to determine ; for as between Her Majesty and one of her subjects there can be no such thing as an act of state. The alleged agreement or *modus vivendi* between Her Majesty's government and the government of France was not in law binding or

obligatory upon the respondents. Consequently, the alleged contravention thereof by the operation of the respondents' factory was not unlawful and affords no justification in law for the appellant's acts. There is no instance of a treaty having been held to affect the private rights of the subject; while there are acts of parliament which have been passed to enable treaties to be carried into effect. Reference was made to *Entick v. Carrington*, 19 state trials, 1080, 2 Wils., 275; *Broom's Commentaries*, p. 794; *Treaty of Utrecht*, Art. 13; *Treaty of Paris*, Art. 5; *Treaty of Versailles*, Arts. 4, 5; 28 Geo. 3, c. 35; 59 Geo. 3, c. 38; *Chalmers' Opinions, Colonies, &c.*, 2nd vol. (ed. 1814), pp. 328, 337; *North American Parliamentary Papers*, vol. 1, *Opinion of Sir R. Palmer*; vol. 2, *Opinion of Sir A. Cockburn*.

No case can be found in which the crown has attempted in time of peace to affect by treaty the private rights of its subjects. For that purpose an act of parliament is necessary. With regard to State necessity, that must relate to the power of the crown to make a treaty apart from its binding force upon private individuals and private rights. There is no authority for saying that State necessity will make a treaty binding upon subjects by force of the prerogative. Such a doctrine would extend the prerogative of the crown so as to enable it to deprive the subject of his property and rights. If necessity is to override law, it is not sufficient for the appellant to shew a necessity for the treaty; but he must shew a necessity for the particular mode of carrying it into effect—that is, for doing so without an act of parliament. For instances in which acts of parliament were passed in order to carry out and enforce treaties, see *Hertslet's General Index*, p. 173; 28 Geo. 3, c. 35; 5 Geo. 4, c. 51, continued by 2 & 3 Will. 4, c. 79; 2 & 3 Vict., c. 96; *Herts. vol. v.* p. 86, 95, 96; 3 & 4 Vict., c. 69; 5 & 6 Vict., c. 63; *Herts. vol. vi.*, p. 343; 6 & 7 Vict., c. 79; *Herts. vol. vi.*, 453; 18 & 19 Vict., c. 101; *Herts. vol. x.*, 86; 31 & 32 Vict., c. 45; *Herts. vol. xiii.*, 422; 40 & 41 Vict., c. 42, s. 15; 46 & 47 Vict., c. 22; *Herts. vol. cx.*, 952. For an instance in which a treaty was not carried out, see *In re Carter Medicine Company's Trade-mark*, W. N. (1892) 106. Reference was also made to an opinion of the law officers, June 3, 1728; *Chalmers' Opinions*, ed. 1814, 2nd vol., pp. 339–42; *Ware v. Hylton*, 3 Dallas, *United States Sup. Ct. Rep.* 199, 273; 1 Halleck *Inter. Law*, p. 261–2; *Cooley's Const. Law*, p. 103.

Sir R. Webster replied.

The judgment of their Lordships was delivered by—

LORD HERSCHELL:—

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents, by their statement of claim, alleged that the

appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory.

By the statement of defence the appellant said that he was captain of H. M. S. *Emerald*, and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving an effect to an agreement embodied in a *modus vivendi* for the lobster fishing in Newfoundland during the said season, which as an act and matter of State and public policy had been by Her Majesty entered into with the government of the Republic of France; that the said agreement provided, amongst other things, that on the coasts of Newfoundland where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on the 1st of July, 1889, should be permitted, unless by the joint consent of the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs, being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July, 1889, and one which was without the consent aforesaid being used and worked by the plaintiffs as a lobster factory whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant, in performance of his duties, did, for the cause assigned, enter into and take possession of the messuage and premises in the statement of claim mentioned, and of certain gear and implements; that such entry into and taking possession of the said messuage and premises, gear and implements, were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of State done and performed under the provisions of the said *modus vivendi*; that the action taken by the defendant in putting in force the provisions of the said *modus vivendi* had, with full knowledge of all the circumstances and events, been approved and confirmed by Her Majesty as such act and matter of State and public policy, and as being in accordance with the instructions of Her Majesty's government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of State arising out of the political relations between Her Majesty the Queen and the government of the Republic of France; that

they involved the construction of treaties and of the said *modus vivendi* and other acts of State, and were matters which could not be inquired into by the court.

The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the court that the points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiffs' claim, but gave the defendant leave to amend.

In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

The learned Attorney General, who argued the case before their lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether, if so, it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their lordships do not find it necessary to express an opinion. Their lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

Their lordships will, therefore, humbly advise Her Majesty, that the appeal should be dismissed with costs.

Solicitor for appellant : *Solicitor to the Treasury.*

Solicitors for respondents : *Burn & Berridge.*

Judgment of the Lords of the Judicial Committee of the Privy Council upon the appeal of The Owners of the steamship *Cyphrenes*, her cargo and freight, vs. the steamship *La Flandre*, from the Supreme Court of Newfoundland, delivered 20th March, 1896.

Present: LORD WATSON, LORD DAVEY, SIR RICHARD COUCH.

(Delivered by Lord Watson.)

Shipping—Collision—Regulations for preventing collisions at sea, Article 18.

Two steamships, on opposite courses on the Atlantic, when nearly a mile apart, sighted each other. The *Cyphrenes* was steering E. $\frac{1}{4}$ N.; the *La Flandre* W. S. W. Both ships were making full speed. Within five minutes of mutually sighting each other the ships came into collision, the *Cyphrenes* striking the *La Flandre* on the port side at an angle of 6° or 7°, and twice after on the same side before passing her stern. Beyond these facts the parties were not agreed, and the pleadings and evidence were in absolute contradiction and differed irreconcilably. The *Cyphrenes* was wrecked by the collision and abandoned by her crew. Her owners and the owners of the cargo and freight afterwards instituted proceedings, alleging that the *La Flandre* was alone to blame; the latter ship defended, and counter-claimed on the grounds that the collision was entirely due to the fault of the *Cyphrenes*.

Held—The *Cyphrenes* was alone to blame and judgment should go against her, and the counter-claim of the *La Flandre* be allowed, in that the *Cyphrenes* should, on seeing the *La Flandre's* red light, have reversed her engines full speed, have kept her helm to port and answered the international signal of the *La Flandre*, none of which regulations she observed but which were all observed by the other ship.

SHORTLY after 6 a.m. of the 30th December, 1893, two steamships upon opposite courses, when nearly a mile apart, sighted each other in the open Atlantic, somewhere about longitude 45° 30' north, and latitude 49° west. One of them, the *Cyphrenes*, of 1309 tons register burthen and 250 horse-power, was bound with a cargo from Savannah to Liverpool, and was steering E. $\frac{1}{4}$ N. The other, the *La Flandre*, an oil tank ship of 1510 tons register and 200 horse-power, was on a voyage in water ballast from Antwerp to New York, her course being W.S.W. Both ships were making full speed, that of the *Cyphrenes* being 9, and that of the *La Flandre* 7 knots per hour. Within five or six minutes from the time when their lights became mutually visible, the vessels came into collision, the *Cyphrenes* first striking the port side of the *La Flandre* with her stem at an angle of 6° or 7°, and then coming twice into contact with the same side of the *La Flandre* before passing her stern. The morning was dark with drizzling rain; but the atmosphere was free from fog, and it is not disputed by either vessel that, from the time when they became visible to each other until the moment of collision, she continued to see the lights of the other ship.

Beyond the facts which have just been narrated, the parties are not agreed. The statements made in their preliminary acts and written plead-

ings, as well as in the evidence given by their officers and crew who were on duty, are in absolute contradiction, which cannot be explained away upon the benevolent theory that the witnesses from the two ships may possibly have put a wrong construction upon what they observed from different points of view. They differ irreconcilably, as to the relative positions and bearings of the two vessels at the time when their lights came within range; as to the manœuvres executed by each of them between that time and their actual collision; and as to their respective rates of speed at the time when the collision took place.

Starting from the points at which they first became visible to each other, the conflicting accounts given by the two ships and those on board of them, are as follows :—

According to the *Cyphrenes*, the green light of the *La Flandre* when first seen was $3\frac{1}{2}$ points upon her starboard bow, which made it the plain duty of both ships to maintain their respective courses, and not to approach nearer to each other. The *Cyphrenes* kept her course, and for some time afterward the ships continued green to green, when the *La Flandre* shut in her green and exhibited her red light, thus indicating that she meant to cross the bows of the *Cyphrenes*. Seeing that the *La Flandre's* change of course involved imminent risk, the helm of the *Cyphrenes* was at once put hard-a-port, and her engines turned full speed astern. Shortly afterwards the collision took place, the headway of the *Cyphrenes* being nearly off her, whilst the *La Flandre* was still making from 4 to 6 knots.

According to the *La Flandre*, when the mast-head and red lights of the *Cyphrenes* were first observed, they were right ahead of her, and her course was at once directed to starboard. Her port helm had just begun to act, and the ship was sheering off to starboard, when the red light of the *Cyphrenes* was shut in and her green light appeared. The *La Flandre* continued upon her altered course, keeping her helm hard-a-port. On seeing the green light of the other ship she gave three successive blasts with her steam whistle, indicating that she was going to starboard; but no notice was taken of these signals by the *Cyphrenes*, which continued to approach her green to red. When the *Cyphrenes* came so near as to involve risk of collision, the engines of the *La Flandre* were stopped and reversed; and her way had been reduced to 1 or $1\frac{1}{2}$ knots, when the *Cyphrenes* ran into her at full speed.

The *Cyphrenes* was wrecked by the collision, and was set on fire by her crew, in order to prevent her doing damage to other vessels. They took refuge on board the *La Flandre*, which had also sustained injury, and put into St. John's, Newfoundland, for repairs. The present action was instituted there by the owners of the *Cyphrenes*, her cargo and freight, upon the allegation that the *La Flandre* was alone to blame for the collision. The

La Flandre defended and counterclaimed, on the footing that the collision was entirely due to the fault of the *Cyphrenes*. Had there been no independent data by reference to which the conflicting testimony of the witnesses from the two ships could be tested, or a reasonable inference drawn as to the fault of one or other of them, the result would have been, that, each party having failed to prove the other's fault, it would have been necessary to dismiss both the action and the counterclaim. But there is one circumstance, established beyond reasonable doubt, which, in their Lordships' opinion, is not only sufficient to justify the conclusion that, at the time of the collision, the *Cyphrenes* was navigated in violation of the 18th Article of the Regulations, but to attach grave suspicion to the testimony given by at least two of her leading witnesses in regard to the manœuvring of the vessels.

The *La Flandre* was docked at St. John's, and there is in evidence a minute account of the injuries which she was found, on a survey, to have sustained from the collision. It appears that, on the first contact of the vessels, the stem of the *Cyphrenes* ran nine feet into the strongest part of the *La Flandre's* port side, cutting it open from the top rail to below the bilge. She then recoiled clear, and twice struck the same side of the *La Flandre* farther aft, on each occasion with diminished force, and thereafter passed her stern, being still under way. From the relative positions which the two ships admittedly occupied at the time, it is clear that the force and penetration of her first blow was due to the *momentum* of the *Cyphrenes*, which depended upon her rate of speed. Their Lordships have been advised by their assessors that, having regard to the character of the injuries inflicted by her stem, the *Cyphrenes* must, at the time of collision, have been steaming ahead at nearly if not fully 9 knots per hour; and that her engines cannot have been previously stopped and reversed, as stated by her second officer and second engineer. In that opinion their Lordships agree, and they are therefore unable to find that the *Cyphrenes* was free from blame.

That conclusion not only involves the liability of the *Cyphrenes*; it also raises very serious considerations as to the degree of credit to be given to her witnesses' account of her manœuvres, between the time of her first sighting the *La Flandre* and the collision. Her second officer, who had the sole charge of her navigation during that critical period, states, that as soon as he saw the red light of the *La Flandre*,—which, he says, was about four minutes before the collision,—he telegraphed full speed astern, that the order was obeyed, and that her engines kept going astern until the collision. He is corroborated in that statement by the second engineer, who was alone in charge of the engine-room. Their Lordships find it impossible to accept these statements, because they are contradicted by real and therefore re-

liable evidence. It is just possible that the second officer of the *Cyphrenes* may have given the proper order; if so, he was clearly mistaken in supposing that his order was obeyed. On the other hand, it is equally clear, that the second engineer, if he received the order, failed to comply with it; and that circumstance gives rise to somewhat more than a conjecture that his failure must have been due to the fact, said to have been explained by him to some of the witnesses for the *La Flandre*, that, at the time when he received the order, he was not standing by the engines, but was otherwise engaged.

It was maintained for the *Cyphrenes*, that the *La Flandre* ought to be held responsible, (1) because the collision was occasioned by her faulty manœuvre in attempting to cross the bows of the *Cyphrenes* whilst both ships were on safe courses, and (2) because she failed to obey the 18th Regulation, by stopping and reversing her engines when the risk of collision became apparent. As to the first of these reasons, their Lordships are not satisfied that the account given by the *Cyphrenes'* witnesses of the manœuvring of the two ships is sufficient to disprove the very different story told by the witnesses from the *La Flandre*. The latter is so far corroborated, and the former to the same extent discredited, by the evidence deducible from the condition of the *La Flandre's* hull after the collision. At that time their Lordships think it is proved that the speed of the *La Flandre* had been slowed down to about $1\frac{1}{2}$ knots, whereas, according to the evidence of the *Cyphrenes*, she was going ahead at the rate of 4 to 6 knots. They do not regard the evidence of the *La Flandre* as in all respects satisfactory. In particular, they have difficulty in understanding why her captain, immediately on sighting the red light of the *Cyphrenes* ahead of him, at the distance of a mile, should have steered hard-a-port, without waiting to ascertain the bearings of the *Cyphrenes*. But they cannot affirm that his then sheering to starboard necessarily contributed to the collision; and after he had elected to take that course, and the green light of the *Cyphrenes* appeared, they cannot say that he did wrong keeping his course, it being obvious that starboarding his helm, at that time, might have occasioned risk of collision.

Their Lordships find it impossible to sustain the second reason urged by the Appellants for condemning the *La Flandre*. She was not charged by them, either in their Preliminary Act, or in their writ, with failure to reverse within due time. The only complaint made was, that she had wrongly altered her helm, at a time when both vessels were green to green, and therefore on safe courses. The new argument was obviously an after-thought, and it was rested upon some statements which occur in the evidence of the navigating officers of the *La Flandre*. Giving fair effect to their evidence, it appears to their Lordships to prove that these officers did

duly comply with the 18th Regulation, and the real evidence tends to show that they had, before the collision, reduced the speed of their vessel so far that a collision might have been altogether avoided, or its results rendered comparatively harmless, if the *Cyphrenes* had done the same. Even if the evidence on that point had been *prima facie* adverse to the *La Flandre*, their Lordships conceive that it would have been their duty to refuse effect to the Appellant's new plea, in accordance with the principles laid down by the House of Lords in *The Tasmania* (15 Ap. Ca. 223) and by this Board in *The Pleiades* (1891, Ap. Co. 259).

Their Lordships have, for these reasons, come to substantially the same conclusion with the learned Chief Justice of the Supreme Court of Newfoundland. They will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The costs of this appeal must be borne by the Appellants.

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Arbitrator—Interest in award.

Under the municipal law a compulsory reference to arbitration was prescribed for ascertaining the damage occasioned to properties by the taking of land for street widening purposes. The statute gave the Municipality the appointment of two of the arbitrators, and the owner of the land a third, and the decision of any two was final and binding. The Municipality appointed its chairman and ex-chairman as their arbitrators, to which the owner of the land took exception. The Municipality declined to substitute others, and were about to proceed with the reference; whereupon the owner of the land applied for an injunction to restrain the parties from so acting, on the grounds of interest, etc. Upon the hearing,

Held—An appointee to such a position as an arbitrator must be one standing indifferent between the parties. Any interest which may be calculated to bias the mind disqualifies. An expression by one arbitrator which indicates bias is sufficient to disqualify and have award set aside. Injunction granted.
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Newfoundland Railway Company's Act—Ejectment of Company from land taken under Act of Incorporation—Tender of award to arbitrator—Effect of arbitrator acting as agent for proprietor of land.

The Newfoundland Railway Company "required for railway purposes" certain lands which, under their Charter of Incorporation, was provided by the Government in proper legal course. The proprietor of the land, whilst assenting to the reference to arbitration, never agreed to the award, nor did her arbitrator sign the same. The Government arbitrators both signed the award. No tender of compensation or award was made to proprietor, though repeatedly made to her arbitrator, who declined to accept. The Company entered upon the lands before arbitration was held or award made, and constructed its line. In an action of ejectment by the proprietor of the land against the Company, on the grounds that the award was void and that she never became divested of her title in the same—

Held—Proprietors of land are not bound to cede same without previous compensation having been paid or tendered.—Compensation must precede the acquisition of land by the Company. Notice of appropriation, or becoming party to a reference to arbitration, not sufficient to affect title of proprietor. Payment of award or tender to proprietor is necessary to give right of possession to Railway Company, by default of which the proprietor has not been ousted of her title in the land. Where land is submitted for arbitration, the owner is estopped from afterwards setting up that it is not "required for railway purposes." Arbitrators totally mistake their position when they act as agent, and the Court will not recognise any such dual position. *Meehan v. Newfoundland Railway Co.*

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Award—Owner of land acting as arbitrator—Effect of to set aside award.

Where under a Railway Company's charter the Government were required to find the right of way through private property. The charter of the company provided for mode of arbitration. An owner of land through which the line passed acted as his own arbitrator. The Government arbitrators made an award to which the owner refused to subscribe. The company entered on the land. In an action for trespass the company pleaded as title the award. Reply—that owner, having acted as arbitrator, and being interested, the award was void.

Held—By a majority of the judges (Pinsent, J., differing), that the objection of interest was one which the other side had waived and might waive; that the owner could not take advantage of his own wrong and repudiate his own deliberate act. The objection to interest only applies to a concealed interest, here it was open and known before the submission to arbitration was made. *Byrne v. Newfoundland Railway Co.*

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Award—Setting aside of—Misconduct and partiality of arbitrators—Insufficiency of award.

Matter in difference which arose in the execution of a contract, was referred to three arbitrators. Two of the arbitrators made an award. The court was moved to set aside award on the grounds (set out in affidavits in detail) (1) gross partiality; (2) procurement of appointment by one of the arbitrators; (3) improper conferences of arbitrators with counsel for one of the parties to the arbitration and with witnesses as to their testimony after being examined; (4) improper rejection of evidence.

Held—As to the first three grounds of objection there was no evidence to sustain the charge. As to the fourth ground,

Held—If intending to decide rightly, an arbitrator comes to a wrong decision, as to competency of a witness, admissibility of evidence or relevancy of allowing proofs of particular facts, the court will not review his decision or set aside award for mistake. Award upheld. *Simpson v. Government of Newfoundland*

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BAIT ACT—

Interference with fishery prosecution—Bait Act—Licenses to haul herring granted under, interpretation of.

The plaintiff, who was a fisherman resident at Lamaline, in the spring of 1890 obtained from the authorities at that place a license to haul bait fishes to be sold to French fishermen who would come to the Newfoundland coast; finding that there was no demand by French fishermen, he determined to load his vessel and proceed to Halifax, N. S. Whilst in the act of loading he was interfered with by the defendant, a commissioner appointed under the Bait Act, and prevented from taking bait fishes under the license held by him, for exportation, or under any license. The plaintiff was accordingly compelled to lay up his vessel and lost the proceeds of his venture. In an action by the plaintiff for damages—

Held—The defendant was within his powers in preventing the plaintiff from exporting the bait fishes. There was an entire suspension of authority to export bait fishes in 1890. *Hann v. Sullivan*

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Bait licensing Act, 1887—Right to exact fee for licenses when not expressly stated in Act—Pecuniary penalty—Alternative penalty of imprisonment—Imprisonment in default of payment.

Under the provisions of the Newfoundland Bait Act, 1889, a license was granted to one Dominick Pincello, a United States fisherman, to purchase bait fishes in Newfoundland waters, in consideration of his paying one dollar per ton on his vessel's tonnage. A complaint having been made before a magistrate that Pincello had on board his schooner more bait than the quantity allowed by the license, the magistrate adjudged the master guilty of a breach of the said Act and fined him one hundred dollars, or, in default, three months' imprisonment, and confiscated and sold his vessel.

Held—On appeal ; no authority under Act to impose a charge or tax as was done in the present case, or authority to receive a money consideration for the privilege conceded ; statutes imposing duties are to be construed as not making any instruments liable to them unless manifestly within the meaning of the legislature ; if words be not found in the taxing Act the tax cannot be imposed ;

Held—Also that the judgment was defective in that the magistrate inflicted the accumulated penalties prescribed, there being no such power in the Act. *In re Dominick Pincello* .

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BOARD OF WORKS—

Public Building—Duty to repair—Liability for injury arising out of defective ceiling—Legislative grant for repairs—Executive responsibility.

A legal practioner, in the exercise of his profession, was at the Police Court when part of the ceiling fell, whereby he sustained injuries. The Board of Works, who take their powers under an act and are appointed by the general government, and whose acts are all subject to the confirmation of the latter, had the management of the building, set up as a defence in an action for damages that they were not liable : (1) In that they were not an ordinary proprietor ; (2) That they were a ministerial body with no funds ; (3) That the legislative vote had been exhausted, and that the case was not one of misfeasance

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or nonfeasance. The jury found for the plaintiff. The Board obtained a rule to have verdict entered for them.

Held—That there is no provision in the colony to prosecute the government for tort; that such an action as the present would not lie; when a transfer of power is made no new liability is created. The Board of Works is merely a department of the government, and is not responsible for the neglect or conduct of servants who are the servants of the public, and not of those who had merely the superintendence of the work.
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Shares—Scrip—Possession of—Assignment of—Non-registration—Delivery of Scrip by assignor—Notice to Company—Insolvency of assignor.

An insolvent some years prior to his insolvency had obtained a loan from the defendant, and in consideration thereof gave him an assignment under seal of certain scrip, shares in a gas company, on the understanding that on repayment of loan the shares would revert to him. The scrip was deposited with defendant. The trustees of the insolvent in an action claimed the scrip on the grounds: (1) That the charter of the gas company required the assignment, in order to be valid, to be registered in the company's books, which had not been done; (2) No notice had been given, as required by the charter of the company, of such transfer; (3) Non-registration under Registration of Deeds' Act.

Held—Trustees in insolvency take no greater estate than that vested in insolvent. Registration of Deeds' Act never contemplated choses in action such as shares in a company, but relate to such property only as to which visible and external possession continues in the assignor after assignment. *O'Deady v. McLoughlan*

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Union Bank of Newfoundland—Contributories—Winding up Act of 1895.

The receivers and liquidators of the Union Bank of Newfoundland have no authority under the Winding up (Union Bank) Act of 1895 to enforce payment of claims under section

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five of the "Act to amend the Act of Incorporation of 1855," against the shareholders as "contributories," and the Court has no jurisdiction to settle the list.	
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The liability of directors provided for by section twenty-four of the Act to Incorporate the Commercial Bank of Newfoundland, 21 Vic., cap. 2, is not an asset or chose in action of the the corporation, and cannot be recovered from the directors by the trustees in insolvency of the Bank.	
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The plaintiff, with his horse and carriage, had occasion to cross defendant's line on the evening of the 11th day of Oct., 1894, where the line crosses a highway on a level, at a time when the defendant's regular train was due at the crossing. In crossing the line the horse of the plaintiff was knocked down and killed by the incoming regular train of the defendant, and the carriage of the plaintiff was greatly injured. The defendants had observed all its statutory duties at the crossing and given the necessary signal from the incoming train, which were not heard by the plaintiff, but the defendants were in the habit of sending a signal man out through their yard for the purpose of seeing that the approach to the depot was safe for the incoming train. This man was in the habit of warning people using the highway, of the approach of trains; on the occasion in question this man was not at the crossing.	
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Apportionment—Counterclaim for unliquidated damages—Set-off against assignees of contract.

By contract embodied in a statute A.D. 1881, the Newfoundland Railway Co. covenanted to complete a railway in five years and thereafter maintain and continuously operate the same. In consideration thereof the Government of Newfoundland covenanted (a) to pay upon construction and continuous operation, an annual subsidy for thirty-five years "to attach in proportionate parts and form part of assets of company as and when

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each five mile section complete and operated." (b) To grant to company in fee-simple 5,000 acres of land for each one mile of railway completed, on completion of section of five miles. The company completed a portion of line, and received from the Government half-yearly payments proportionate part of subsidy which was deemed to attach thereto, and the specific grants of land. Thereafter the contract was broken by the company and the government refused further payments. In a suit by the company, and its assignees,

Held,—(1) On completion of each section proportionate part of subsidy became payable for a specified term, subject to operation. (2) Claim to grant of land was complete when section which carried it was complete. (3) No right of counter-claim for damages against trustees of bond-holders for failure of company to complete line. *Newfoundland Railway Company and Evans and Adamson v. the Government of Newfoundland*

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Whaling and freighting agreement—Construction of—Detention—Period of Service—Wages—Damages.

The crew of a vessel, under a whaling and freighting agreement, proceeded to Davis Straits. There they were frozen in. The following year they fished, and returned to Newfoundland in August, 1885. On arrival members of the crew sued for full wages and damages for breach of agreement in not terminating agreement within the year they signed. No period was mentioned in agreement as to termination of whaling portion, though it was admitted there was a limit as to the freighting agreement.

Held—(Parol evidence having been admitted to supply the ambiguity) that it is a question for the jury to say the length of the whaling voyage contemplated, when the agreement is silent on that point. Parol evidence may be admitted to show the length of a whaling voyage contemplated by the parties to it when the agreement is silent as to the determining of the same. *Gallagher v. Spicer; Burdette v. Spicer*

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Conveyance of fishermen from Labrador—Fares to be charged—Overcrowding of passengers—Act respecting passenger steamers—Construction of—Shipwrecked crews, what are?

The defendant, by a note in writing, had agreed with the plaintiff company to be responsible for the payment of the passage money, at the regular rates, of a number of fishermen whom he was bound under agreement to convey from the Labrador to their homes. The company conveyed the men home. The defendant refused payment of the regular fares charged, and alleged (a) That under the agreement (which was destroyed) he had stipulated that he would pay only in the event of the Newfoundland government refusing payment; (b) That the latter was liable as the men were shipwrecked men; (c) That

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the refusal of the government was a condition precedent to his being sued ; (d) That the agreement as a whole must fail as it arose out of an unlawful contract which was to convey more men than by law the ship was allowed.

Held—(1) There was no evidence to show any such condition had been attached to the agreement as that claimed ; (2) The men were not shipwrecked men, as their vessel had been lost before their fishing voyage commenced, and they had already contributed from their voyage their per capita contribution for their passage money home ; (3) The provisions of 41 Vic., cap. 14, did not apply, as there was evidence that the time, occasion and circumstances relieved the plaintiffs from an observance of the provisions of that Act ; (4) Owing to the overcrowding of the ship and the lack of accommodation the plaintiffs were not entitled to full passenger rates for that portion of the passage where the overcrowding existed. *Newfoundland Coastal Co's v. Hennessey*

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Specific work—Compensation for services not within scope of employment.

Where it appeared that the plaintiff, who, whilst on a mission abroad for the defendants, for which he was compensated, performed, at their request, certain services outside the scope of his mission.

The Court was of opinion that, there being no express or implied contract that he was to receive compensation for the extra services performed, that he was not entitled to the same, and that the work so performed must be held to have been within the scope of his employment. *Shea v. Government of Newfoundland*

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Contractors—Breach—Discontinuance—Notice—Damages.

The plaintiffs had let a portion of their premises to the defendant government as a telegraph office, had fitted it up, and one of their firm had been instructed in telegraphy and taken charge of the office. There was no written agreement as to hiring ; the salary was the receipts of office. Without notice the instruments were removed, and another person appointed operator without any cause assigned.

Held—That to terminate such a contract the plaintiffs are entitled to a reasonable notice, such as six months ; in such a contract a notice is implied and should have been given.—*March v. Government of Newfoundland*

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Void and voidable—Non-observance of conditions—Damage by termination—Post Office Act—Construction of.

The plaintiff entered into an agreement in the year A.D. 1886 as a mail carrier, at a yearly hiring, terminable by three months notice. In 1889 an agreement for the same service was entered

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into between the parties for four years, terminable by the defendant in the same way if the plaintiff did not satisfactorily perform the service. In the following year, without any cause assigned, the contract was terminated. In an action for damages for dismissal and termination of contract, the defendant set up as a defence that the contract was void and voidable for non-observance by the defendant of condition of Post Office Act, such as public notice for tender, &c., &c.

Held—That whilst in all such contracts the terms of the statute ought to be observed, yet, as in this case, the non-observance was not the plaintiff's, and as damage was sustained the plaintiff was entitled to compensation. *Rabbits v. Government.*

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Implied contract—Action for authority of official to pledge credit of Government—Reimbursement of moneys expended—Remuneration for extra services.

Where a police officer was transferred to a station of greater responsibility, entailing work beyond his ordinary duties, although there was no express agreement for extra remuneration, in an action for payment for extra services,

Held,—That as in the case of ordinary parties to a contract of service, if an official's position be altered and he be transferred from a place of less responsibility to one of greater, or extra or new duties be imposed on him, he is entitled to compensation.

Held—Also that where a case of absolute necessity arises for an officer, in his official capacity, to incur an unavoidable expenditure, he might seek reimbursement from the Government. *Smith v. Government of Newfoundland.*

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Sub-contract—Erection by tender based on plan—Warranty as to the nature of site—Allowance for extras.

Where a party sub-contracted to erect a lighthouse according to plans and specifications submitted, and it was afterwards found that there were greater undulations and inequalities in the ground than could have been gathered from the plan, the contractor having taken this risk. The sub-contractor found it necessary to put in extra work to complete contract. In an action by the sub-contractor the jury refused the extras. On a motion to set aside the verdict on the grounds that the plan did not show the inequalities, and must be taken as part of the contract,

Held—That the plan was part of the contract only in so far as it was expressly referred to and incorporated in the terms of the contract. That unless there was something in the character of the ground of an unusual and extraordinary kind which should have been brought to the notice of the sub-contractor, he must be held to have taken the risk. *Brown v. Coleman.*

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Contract—Lease—Infirmity of lessor—Inadequacy of consideration—Fiduciary relationship.

Where the plaintiff, who was an aged and illiterate person, entered into an agreement with his son for a lease of a certain property; it appeared that the lease was drawn up by the plaintiff's solicitor, taking his instructions from the plaintiff's son. The plaintiff afterwards repudiated the lease, and claimed he had never signed it. The value of the rental of the premises was \$200 per year, the amount set out in the lease was \$80 per year. It appeared also that just before the defendant took possession the plaintiff had expended \$1,200 on repairs to the premises. The witness to the lease was not in the country, and the solicitor who drew it was dead. The defendant had been in possession and had paid rent for four years at the rental in the lease before the rental of \$200 was claimed. In an action for the rental of \$200 per year, which the plaintiff claimed was the sum at which the premises had been leased,—

Held—The evidence disclosed gross inadequacy, and there was no evidence to dispel the inference of the law against the unfairness of the alleged contract, especially as there was a fiduciary relationship between the parties. In family matters there should be on all sides *uberrima fides*, or the most entire confidence. Lease cancelled and set aside. *McCarthy v. McCarthy*

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COSTS—

Costs—Consolidation of distinct causes of action—Judgment for plaintiff on some issues, for defendant on others—Apportionment of costs.

Where, in an action combining several distinct causes of action, the plaintiff obtains judgment on one portion of his claim and the defendant on the other.

Held—The plaintiff is entitled to recover general costs of suit, that is costs which would have been incurred had he confined himself to that portion of his claim upon which he succeeded. The defendant is entitled to all costs of resisting those parts of the plaintiff's claim which has been defeated. In taxing costs in an action comprising distinct claims, and which result in separate issues, the costs should be treated distributively. *Pitts v. O'Dwyer*

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Costs—Rule for stay of proceedings and reference—Rule silent as to costs—Costs in discretion of arbitrators—Power of Court to order as to costs after publication of award.

Where, in an action against an insurance company, the company pleaded in bar the condition in policy that, should a

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difference arise, the parties should submit the same to arbitration. Judgment was given against the company; the company obtained a stay of proceedings and reference, but the rule was silent as to the costs of the arbitration and award; an award was made in favor of plaintiff with costs; a summons was obtained for the taxing of the costs, to which cause was shown contra, and it was contended it was *ultra vires* in the court to give directions as to costs when the reference was under the condition of the policy, and that the application was too late as it was after the publication of the award.

Held—The court had authority to make an order as to costs of an arbitration and award as if it was a compulsory reference. The costs of the reference and award should be in the discretion of the arbitrators. *Murray v. London Assurance Co.*

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COURTS—

Territorial jurisdiction—Legislature of Newfoundland—Bays and Headlands—High seas—Taking seals within the three mile limit—Appeal.

It appeared that the defendant, who was the master of a British ship, killed and took on board his vessel seals previous to the date fixed by the Legislature of Newfoundland for the taking of same. The seals were all taken at a considerable distance beyond the three mile limit, from headland to headland, on the Newfoundland coast. In an action for the penalties under the act, the jurisdiction of the Newfoundland courts was pleaded, i. e., that the seals were all taken outside the three mile limit on the high seas. The magistrate dismissed the complaint.

Held—On appeal, (Pinsent, J., differing) that the territorial jurisdiction of the courts of Newfoundland for such offences as that complained of, extends to three miles outside of a line drawn from headland to headland of the bays of Newfoundland and no further. The acts of the local legislature have effect and operation to that extent only. Appeal dismissed. *Rhodes v. Fairweather*

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COVENANT. See LANDLORD AND TENANT.

CROWN—

Right of grantee to waters abutting on land under a mining grant—Power of Crown to grant exclusive rights to the public waters—Imperial statutes bearing on same.

The plaintiff erected a building on the shore and over the public waters abutting on and near land held by the defendant from the Crown under a mining grant. The defendant notified the plaintiff to remove the building, and subsequently, by

CROWN—*continued.*

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their servants, tore down and removed the same. In an action by the plaintiff for damages the defence set up was that by virtue of a mining grant held by defendant the property abutting on the waters over which the erection had been placed was their sole and exclusive property and that the plaintiff was a trespasser.

The Court was of opinion that the defendants were liable for the loss and damage sustained by the plaintiff by the pulling down ; that the title set up to the public waters was untenable and in contravention of Imperial acts relative to the occupation of our coasts for fishery purposes. The granting by the Crown of such excessive right would be contrary to public policy and in derogation of public rights secured by statute. The shores and navigable waters of our harbors cannot be alienated ; such a grant would be *ultra vires*. *Bransfield v. Beatty*.

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Prerogative of Crown—Petition of right — Tenure of office—Servants of Crown—Dismissal.

Under "Claims against the Government Act," which act supersedes the old practice of "Petition of Right," the petitioner sued the Newfoundland Government for breach of an alleged agreement in depriving him of an office which he had held temporarily under an acting appointment, and which, it had been agreed, he was to have permanently. The retainer by the Government, that petitioner acted and performed the duties for four years and was paid by legislative sanction, was admitted.

Held—That petitioner had no right of action ; that a Colonial Government is on the same footing as Her Majesty's Government as to the employment and dismissal of servants of the Crown, who, in the absence of special agreement, hold their offices during the pleasure of the Crown. *Skelton v. Government of Newfoundland*.

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Prerogative—Treaties—Interference with private rights—Acts of state.

Quere—Whether the Crown has the power of compelling its subjects to obey the provisions of a treaty, made either for the purpose of putting an end to war or to preserve peace, or whether interference with private rights can be authorized other than by the legislature ; where the government justified certain acts in derogation of the private rights of the plaintiffs, in regard to their lobster fishery, as acts and matters of state arising out of political relations between Her Majesty the Queen of England and the French Government, contending that they involved the construction of treaties and of a temporary *modus vivendi* for lobster fishing in Newfoundland, and other acts of state, and that they were matters that could not be enquired into by the courts.

Held—That this defence disclosed no answer to the action.

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CUSTOMS. *See* REVENUE.

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DEBENTURE BONDS. *See* DETINUE.

DEDICATION. *See* WAY.

DEED OF COMPOSITION. *See* INSOLVENCY.

DEFAMATION—

Slander—Non-publication—Privileged communication—Malice—Damages.

The plaintiffs and defendants were fishermen at Labrador. The former accused the latter of feloniously stealing a salmon net mooring and other gear. The plaintiffs denied having taken the property. The defendant justified the charge and set up non-publication and that the statement was a privileged communication.

Held—That bruiting about reports to parties who had no concern in the transaction could not be held to be privileged. The charge without the innuendo of felonious taking is actionable, for slanderous words are actionable when imputing misconduct to a man in his business. *Hearn v. Hawker* . . .

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Slander of title—Marriage settlement—Contract—Consideration.

A woman being possessed of certain lands, in contemplation of her marriage assigned the same by deed to a trustee, to hold (1) for her use till her marriage; (2) for her use for the term of her natural life, and (3) after her decease, then for the use of her children begotten by the contemplated marriage. A child was born of the marriage. Both parents died. Some time before her death the mother sold the property of the *cestui que* trust to the plaintiff, who, upon endeavouring to sell, was stopped by a public notice from the trustee under the deed of trust. On a case stated for the opinion of the Court—

Held—(1) That the trust deed was not voluntary and void against the plaintiff purchaser; (2) The mother had no authority to sell, so as to deprive the *cestui que* trust of his right in remainder after her life estate. *Jerritt v. Scott* . . .

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DEMURRAGE. *See* SHIPPING.

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DETINUE—

Debenture bonds—Assignment as cover for advances—Continuing security—Non-registration—Non-delivery—Power of bank to assign—Insolvency of bank.

In the year 1886 the Commercial Bank of Newfoundland by deeds assigned to the London and Westminster Bank, London,

DETINUE—*continued.*

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certain debenture bonds to the value of \$144,100, as security against advances to be made on current account, to be held so long as any amount remained due to the London and Westminster Bank. The bonds so assigned were held by the assignors for the purpose of collecting the annual interest due on the same. In 1892 the indebtedness of the Commercial Bank was completely paid off, but the bonds were not re-assigned and further advances were made, and, on the suspension of the Commercial Bank in 1894, it was in debt to the London and Westminster Bank in excess of the value of the bonds assigned. In an action of detinue by the London and Westminster Bank it was contended by the trustees of the Commercial Bank, (a) That the assignment of the bonds was *ultra vires*; (b) That the assignment was incomplete as there was no delivery of the bonds and the assignment was not registered; (c) That when the indebtedness for which the bonds were assigned was paid off, the bonds passed to the assignors by operation of law.

Held—That the manager and directors of the Commercial Bank had acted within their powers in assigning the bonds; that the registration law for deeds does not apply to such securities or choses in action; that the bonds were assigned as security for all future advances; that the manual delivery of the bonds was not necessary to perfect their transfer. *London and Westminster Bank v. Trustees Commercial Bank* . . .

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DEVIATION. See SHIPPING.

DIRECTORS' LIABILITY. See COMPANY.

DONATIO MORTIS CAUSA—

Bank notes—Resumption of possession.

The deceased requested her son, with whom she resided, to draw from the Savings' Bank, for her, \$1,200, which he accordingly did, and having brought it home, she placed it in her box. This was some six months previous to her death, and some short time after the execution of her last will, in which her properties and her monies had been bequeathed in detail to her children. It was stated by the son that this sum was afterwards, in the presence of witnesses, allocated by his mother to various parties (including himself for the largest amount), conditional in the event of her not living. Some weeks before her death deceased gave her son the key of the box, and requested him to take out the said sum, which he did, and count it; she then directed him to replace it in her box, confirming her previous directions with some additions. After her death the son distributed the amount as directed. In an action by the executor for the \$1,200,—

Held—That the facts as deposed to did not constitute a *donatio mortis causa*. *Morris v. Murphy* . . .

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DONATIO MORTIS CAUSA—continued.

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Bank-book—Household furniture—Requisites to be valid.

The deceased, about a fortnight before her death, told plaintiff to go to the bank and get whatever money was in her name put in plaintiff's name. Plaintiff took the bank-book out of the box of the deceased at her request. Deceased handed it to plaintiff and told her to keep it. She kept it in her possession up to time of deceased's death. At the same time deceased told plaintiff "what was in the house was hers." The plaintiff was a niece of the deceased, and had lived with her thirty-five years and had not received any wages. The above facts were corroborated by witnesses. In an action by the administrator of the deceased for the bank-book and household furniture,—

Held—That the gift of the bank-book constituted a valid *donatio mortis causa*, but that of the household furniture did not. There must be a delivery of and a parting with possession and dominion over that which forms the subject matter of the *donatio mortis causa*. *Curtis v. Emerson* . . .

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Deposit receipt.

The deceased requested his sister, with whom he lived, to take from his trunk a bank deposit receipt for a large sum of money, and then, in the presence of his sister and her husband, said, "What money was in that note was his sister's and her husband's"; deceased then handed his sister the note, which she placed in her own trunk and retained possession of till deceased's death. In an action by the next of kin for a distribution of the estate of intestate,—

Held—That the facts as deposed to did not constitute a *donatio mortis causa*, and that the estate, including his deposit receipt, should be distributed amongst the next of kin. *Leahy v. O'Keefe* . . .

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EJECTMENT. See LANDLORD AND TENANT.

EMPLOYER—

Employer's liability—Negligence and incompetency of fellow-servants—Common employment—Contributory negligence—Negligence of employer—Damages.

A workman engaged on a steam scow had his foot taken off whilst in the execution of his duty, through failure on the part of his employer to select competent fellow-servants and superintendents. In an action for damages a jury found a verdict for \$1,000. On motion to have verdict set aside on the grounds that the accident arose from the act of a fellow-servant in the course of a common employment and non-culpability on part of employer—

Held—That where the employer retains incompetent and unqualified servants and an accident occurs he is responsible to his employee, though not so under ordinary circumstances,

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when the act is by his fellow-servant. When the employee entered the service he did not undertake to run extraordinary risks such as had led to the injury complained of. <i>Bulger v. Simpson</i>	130
EQUITABLE MORTGAGE. <i>See</i> INSOLVENCY.	
ESTATE—	
<i>Intestate estate—Moneys in Savings' Bank in accounts of various names.</i>	
Where a party dies intestate having moneys deposited in Savings' Bank in the names of different parties—	
<i>Held</i> —That there was a clear gift to each of those named for whom the deposit was made, and such amounts did not form part of estate as assets for distribution. <i>In re Estate of Joseph Drovers</i>	45
ESTATE FOR LIFE. <i>See</i> WILL.	
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EXECUTOR—	
<i>Bill praying for account—Estate property—Sale of—Purchase by executor—Collusion with other legatees.</i>	
Plaintiff filed a bill against the defendant executor praying that an account might be had of estate property, and charging defendant executor with fraud and collusion with other legatees in the realization of certain assets of estate. It was admitted that the defendant executor had employed, as did also his daughter, parties to appear at the sale and bid the property up, and to one of these it was ultimately knocked down, and subsequently assigned to the defendant.	
<i>Held</i> —There appeared to be nothing of a collusive or fraudulent character in the sale or purchase to render it void. <i>Collins v. Collins</i>	549
FISHERIES ACT—	
<i>Fisheries Act—Construction of—Setting net moorings—Appeal.</i>	
Where a party, in accordance with the provisions of the Coast Fisheries' Act, set his moorings and cod-net, but fearing injury from ice took in his net, leaving his moorings, which were afterwards carried away by stress of weather. Shortly after other moorings were set in the same place by another party. The first party to occupy the ground claimed in an action against the second party that he had the right to return as he did and reset the trap so taken up.	
<i>Held</i> —That under the case as stated the first party lost and never after acquired his original place as against an intervener. <i>Doran v. Power</i>	120

FISHERY COMMISSION—

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Powers of—Construction of rules—Setting cod-traps, Labrador—Right of action for damages by reason of infringement of regulations.

A party set his cod-trap on the coast of Labrador, so near to another's trap as to lessen the catch of the latter. It appeared that in 1888 a law had been passed abolishing cod-traps, but in 1889 a Fisheries' Commission was established with powers to make rules for regulating the prosecution of the fisheries. One of the rules permitted the use of cod-traps, but did not define the distance they were to be set from each other, as was provided in the law repealed. In an action for damages—

Held—That as the rules of the Fisheries' Commission only prescribed the use of cod-traps, there is nothing to prevent the setting of a cod-trap near to another so long as it does not amount to a breach of the common law. *Mitchell v. Bartlett* . 711

Larceny—Fishermen—Sharemen—Undivided Share.

Three prisoners being in custody for larceny for forcibly taking their undivided share of fish. The Judge, in discharging them,

Held—That sharemen in the fishery had no right to take possession of their assumed share of the voyage during its continuance, or at any time, till set apart for them, and they would be liable criminally if by force or stealth they took their undivided share. *Queen v. Brown, et al.* . 239

Interference with fishery—Force of local usage in the setting of cod-traps—Fishing ground—Splitting ground—Forcible removal of nets and craft.

A fishing vessel, with master and crew, anchored and fishing with nets set along the coast, was boarded by the residents near by, their nets taken up and placed on board their craft, their anchor weighed; they were informed they would not be allowed to fish, alleging as a reason that the mode of fishing was a violation of the law laid down by the people of the neighbourhood for the government of the fishery. The master made sail and went and fished beyond the limits. In an action for damages—

Held—That it is not competent for the inhabitants of any particular locality, or for persons engaged in any particular mode of fishery, to impose upon others what is not the law of the land. Fishermen may agree to regulations and give them effect by voluntary submission, but they do not bind those who are not a party to them. All the Queen's subjects have equal rights on the fishing grounds, and in their uses everywhere on the coast, and there is no restriction upon them, except the existing law and the rights of those actually occupying portions of the fishing grounds. *Stone v. Welland* .

FISHERIES' SERVANTS. *See* INSOLVENCY.

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FOREST FIRES. *See* MASTER AND SERVANT.FRAUDULENT PREFERENCE. *See* INSOLVENCY.

GIFT—

Delivery—Monies—Gift of monies by word of mouth without delivery.

Monies (packets of sovereigns) were found in a box of the testator outside the property he had bequeathed under his will to certain of his children. These monies were claimed by the wife of one of testator's sons as hers, and as trustee for certain of her children, and that it was a gift *inter vivos*. One of the next of kin disputed this position, and claimed the money should be regarded as belonging to the general estate of the testator. The evidence in support of the son's wife and her children for the position set up was that the testator had said, pointing to the packets of money, before he died, "It is all for you and the children." There were other facts adduced pointing to the same intention.

Held—That there was not the clear and unequivocal terms of present donation, accompanied by a change of ownership, which is essential to constitute a binding and concluded gift *inter vivos*. The evidence only supported an unfulfilled intention of testator, which could not be allowed to take the place of a formal will or effectuate the gift. *In re Jas. Fitzgerald* .

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Inter vivos—Setting aside.

The defendant, with whom a servant (his sister-in-law) lived for a great number of years, deposited without her knowledge in a savings' bank in her name a sum of money, receiving a bank-book in her name. The book was delivered to the servant on the day of deposit, and retained by her for three years, though nothing was drawn on it. At the end of that time she gave it back to defendant for safe keeping, and was retained by him until her decease, which happened some short time after. It was contended that the giving back of the book revested the money in the donor. On petition of trustee for direction of court—

Held—That there was a good gift *inter vivos*. That defendant exercised acts of ownership over the gift; that there was a clear intention expressed by donor to give, and an actual handing over of the *indicia* of the property and a parting with the fund, and no restoration in the donor. *Moore v. Pouver* .

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GUARANTEE—

Property mortgaged to secure amount guaranteed—Insolvency of mortgagor—Right of mortgagee as against insolvent's trustees.

Where the plaintiffs had gone security to a bank for an advance to be made to a third party, taking as security under a

GUARANTEE—*continued.*

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mortgage for "three years, or so long as credit should be continued in force," certain properties. The mortgagor becoming insolvent the trustee claimed that the mortgage was ineffectual, and that it only contained an interest for three years, beyond which the credit had gone.

Held—It was not intended that security should expire within three years, but that it should continue until the guarantee was redeemed and terminated. The words "continue in force" must be held to mean so long as the plaintiffs are liable on their guarantee. *Harvey v. Hunt*

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GUARDIAN. See **INFANT.**

HOLOGRAPH. See **WILL.**

HIGHWAY. See **MUNICIPAL ACT.**

HUSBAND AND WIFE. See **INSOLVENCY.**

INDICTMENT. See **PRACTICE.**

INFANT—

Guardian, removal of—Welfare of infant.

On an application for a *habeas corpus* directed to the *quasi* guardian of an infant to deliver up same to the father; it appeared that the infant was born in 1884. The mother of the child, who had died shortly after its birth, had, in a letter addressed to the father, confided the child to the care of her aunt, the present *quasi* guardian. The father appeared to have assented to this, and the child continued with the guardian and was maintained and educated by her. The child was removed from Scotland, where the father resided, to Newfoundland, where the guardian had established her permanent home. It was admitted the father had contributed somewhat to the maintenance of the infant. The treatment of the child by the guardian was not questioned—she was a person of means, and spared no expense on the education and care of the infant. The father was a master mariner, and was a great deal of his time at sea. He was about to marry again. There was danger that the health of the child might be injured by removal.

Held—Under all the circumstances, that it was not in the interest or the welfare, health or happiness of the child that it be taken from its present custody, and, so as to bring it under the control of the court, the present custodian be appointed guardian; rule discharged. *In re McGirr*

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Guardian, removal of—Welfare of infant—Religious education.

On an application for a *habeas corpus* directed to the mother of the child, a widow, for the delivery of the same to the paternal grandfather, it appeared that the infant was about nine

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years of age, that previous to the death of the father, and during his absence, the child had been sent away by the mother to a relative of hers, and that, on the father's return, he had expressed his determination to regain possession of the child, and, with regard to all his children, that they should be brought up members of the Church of England, whereas now they are being educated as Roman Catholics.

Held—That the father has the first and the mother the second title to the guardianship of their children. The father being dead the rights of the surviving mother are absolute. As regards the question of religious education, the court has no preferences, and looks only to the welfare of the child, and holds that the Protestant and Roman Catholic faith are equally beneficial. Rule discharged. *In re Congdon*

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INFLAMMABLE OILS ACT—

Quantity on vessels same time — Confiscation — Fine — Penal statute—Construction of.

A party was convicted and fined for violation of Inflammable Oils Act, 43 Vic., cap. 17, "having on board a ship stored in harbor at same time greater quantity than five casks." Under 31 Vic., cap. 13, provision is made for confiscation of oil in addition to fine. Complaint was under 31 Vic., cap. 13. Complainant contended oil should be confiscated. Both complainant and defendant asked for a case to be stated for the opinion of the Supreme Court, which was granted. On the hearing it was

Held—That it would be stretching the principle of construction in *pari materia* to include a penal provision in another Act, when the Legislature has expressly declared the penalty. An order for confiscation could not be made cumulative the fine. *Noseworthy v. Bowring*

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INJUNCTION. *See* PRACTICE AND LANDLORD AND TENANT.

INSOLVENCY—

Confirmation of Deed of Composition after declaration of insolvency.

In 1882 the insolvent was so declared, and a certificate and final discharge granted. In 1883 a Deed of Composition was entered into. On a motion to confirm this deed and transfer all property in the hands of the trustee to the insolvent, the court intimated that the motion was unprecedented, and it would require undoubted proof of its authority to make such order. *In re Smith McKay*

44

Intestate estate—Equitable mortgage—Preferential claim—Registration.

It appeared that amongst the assets of the insolvent estate of the intestate was a mortgage, which had been pledged in the

INSOLVENCY—*continued.*

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nature of an equitable mortgage, for a loan of a less sum than its value. The only writing was a receipt of the amount advanced, and this memorandum was not registered. The holder claimed the mortgage as security for amount advanced, and interest thereon. On a petition by the trustees of the intestate estate for direction of the court—

Held—That the Registry Act is intended to meet the case of a declaration of insolvency of living debtors, and not estates of deceased persons, and that the holder was entitled to the mortgage as security for his debt. *In re John Boone* . . . 196

Fraudulent preference—"With a view of giving an undue preference"—*Notice of insolvency by payee.*

The insolvent, shortly before his insolvency, had made a large payment to a creditor. The trustee of his estate claimed to have the money refunded, on the ground that the payment constituted a fraudulent preference under the Insolvency Act.

Held—The payment did not constitute a fraudulent preference: (a) As it did not appear that the payment was made with a view of preferring the payee over his other creditors; (b) The payee had no notice of, nor was he aware of the insolvency of the payor. *Hunt v. Hearn* . . . 615

Husband and wife—Monies lent for trade purposes—Married Woman's Property Act, 1883—Claim on trustee of insolvent.

The wife of the insolvent was entitled to certain property in her own right, the rents from which were received by her husband from time to time, and, for some years previous to his insolvency, appropriated to his business, and with wife's knowledge. The wife claimed to rank as a creditor on insolvent estate for monies so appropriated, and that the words of the "Married Woman's Property Act, 1883," do not apply, as such lending must be regarded as a trust fund. The matter being referred to the master, A. J. W. McNeily, Q. C., reported against the claim. On argument on exceptions to report—

Held—When husband and wife live together the wife cannot charge the husband or his estate as her debtor for her separate income which she has permitted him to receive. Report upheld. *In re Richard Harvey* . . . 442

Insurance Club rules—Exceptions, master's report on—Contribution of trustee to club—Preferential claim.

One of the rules of a Mutual Marine Insurance Club provided that "the club would have a lien on each vessel insured for a proportion of all losses for the year." The insolvent was owner of three vessels, but the trustees of his estate refused to pay the contribution as preferential, but offered the ordinary dividend. On an *ex parte* hearing—

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Held—That such a lien or charge must fail. That it is not in the nature of an equitable mortgage. That it is an uncertain contract, ambiguous, and not capable of being enforced. To give effect to such a contract would be contrary to the policy of the Merchants' Shipping Acts. *In re Tucker, et al, ex parte Insurance Club* 123

Petition for — Property of insolvent previously mortgaged to petitioner—Title—Misrepresentation.

The mortgagor to secure to his merchant payment of a large indebtedness mortgaged his property situate in the Dominion of Canada, the mortgagor to remain in possession and pay off consideration in five years. The law agents of the mortgagees at Quebec advised after execution of mortgage that the title of property conveyed was defective. The mortgagees petitioned for the mortgagor's insolvency, treating the mortgage as a nullity.

Held—That opinions of counsel are wholly insufficient to sustain charge of misrepresentation of title, and do not warrant mortgagees in treating their deed as a nullity and thus enabling them to treat the mortgagor's indebtedness as one recoverable in *presenti*. Petition dismissed. *In re James Fox* 126

Receiver of voyage—Fishery servants—Wages—Privileged creditors—Insolvency of employer—Notice of hiring.

It appeared that the plaintiff and others were shipped under an agreement with planters for the fishery, and in some cases on the premises of and with the knowledge of the supplying merchant. In some instances their names also appeared in the latter's books of accounts. The amount of fish "put in" at end of season was insufficient to pay the planter's account with his merchant. The fishery servants, notwithstanding the insolvency of the planter, claim that the merchant, the "receiver of the voyage," was liable for their wages in full. It was contended by the supplier that he was not liable in that he was not aware or "privy to the hiring," and had not had notice of the claim for wages before he had paid for the fish turned in, except to a small extent. On appeal from the decision of the magistrate against the receiver of the voyage it was

Held—Engagement by planter of fishery servants on merchant's premises is evidence of privity and knowledge by merchant. When hiring takes place elsewhere, to constitute a notice it must be brought in some way to knowledge of supplier. On failure of planter, receiver of voyage is liable *pro rata* to extent of voyage received of shares and wages of fishermen, to whose hiring he was originally privy—and of such whose employment he had notice—and to the extent of voyage concurrent with such notice. *Antle v. Baine, Johnston & Co.* 99

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Vesting order—Property passing under assignment previous to master's report—Exception to.

On the hearing of the insolvency it appeared that a conveyance had been made by the insolvent of his property to his supplying merchant, but had not registered the same. The court ordered that such property as had come into the supplying merchant's possession previous to the vesting order should pass to him. The question as to what property passed was referred to the master, to whose report exception was taken, principally on the ground that the quantity of property had not vested in the supplying merchant as reported, prior to the vesting order in insolvency.

Held—That a perfected delivery and possession of all goods accompanied the assignment when the supplying merchant's agent took charge, carrying with him a letter to insolvent to the effect "that you will vest in him all goods that you may have." *In re Jabez Saint*

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Banker and customer—Moneys entrusted for collection—Trust—Right to repayment out of estate.

Where moneys are entrusted to a banker to collect and pay the same over a trust is created, and in the event of the insolvency of the banker before the moneys have been paid over payment may be demanded out of the estate.

This case was argued on a summons taken out by the trustees of the Union Bank, but as all the material facts are set out in the judgment it is unnecessary to do so here. *Trustees Union Bank v. Trustees Commercial Bank*

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INSURANCE—

Contract—Policy of Insurance—Insurance Club—Construction of rules of club—Time.

The schooner *Frederick* was insured in the St. John's Mutual Insurance Club from noon of the first day of April till noon of the fifteenth day of December. She was lost at 6.30 p. m. on the fifteenth of December. Insured contended that as schooner was prevented by stress of weather from reaching her destination and not from ordinary causes, her insurance was existing at time of loss and would so continue while the voyage was incomplete according to rules of club.

Held—That the two extremes of the time are the termini of the risk. The court has no authority to modify a contract as regards hours any more than as regards months or years.—*Murphy v. Mutual Insurance Club*

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Fire—Conditions to furnish proof of loss—To use care for preservation of property—Damage—Wrongful acts of third parties—Civil commotion and riot, loss occasioned by.

INSOLVENCY—*continued.*

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Policies of insurance were effected on goods, portion of plaintiff's stock in trade, destroyed by fire on July 8th, 1892. The defendant companies declined paying on the grounds that the assured had not complied with the conditions in his policies : (1) To furnish proof of loss within fourteen days ; (2) To use proper means to preserve property insured ; and further that no loss was sustained under policies. It appeared that when the destruction of the property was imminent large numbers of persons entered the premises of plaintiff and carried away portions of the goods insured, and also destroyed quantities of the same. It also appeared that about one-fourth of the property on the premises was uninsured. In an action for the insurance the jury found for the plaintiff. Upon a motion on behalf of the defendants to set aside the verdict, it was contended, (a) That the company was only liable for such loss as was the direct result of the fire, and not for property stolen, abstracted or damaged ; (b) That there had not been due care by plaintiff to protect property from depredations ; (c) That there was an abandonment of the property by the plaintiff before the fire reached it which was not justifiable ; (d) That the fire was not the proximate cause of the loss ; (e) That the fire was caused by a civil commotion and riot, and was an exemption from liability under a clause of the policy.

Held—Any loss resulting from an effort to put out a fire, whether by spoiling goods or otherwise, directly or indirectly, is within the policy ; breakage by removal, damage by water, loss or theft, occasioned by exposure, are within the loss covered by the policy.

Held—From the evidence, the assured had done all that a prudent man could do to save his property, and that there was not a mere remote apprehension of danger, but an immediate danger ; that the property was only abandoned after all hope to save it had been given up.

Held—That there was no evidence to support the contention that the assured had not complied with the condition of the policy to furnish the defendants with a statement of the particulars of his loss.

Held—There was no evidence to support the plea that the loss by plunder was occasioned by a civil commotion or riot during the happening of the fire. Verdict of the jury sustained. *McPherson v. Guardian Insurance Company* . . .

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Fire—Release—How far releasor estopped by.

The plaintiff was insured in the defendant company ; the property insured was destroyed by fire ; the defendant refused payment on the grounds that the plaintiff had no interest in the property insured by reason of certain insurance covenants contained in his lease. The company, however, paid the plain-

INSOLVENCY—*continued.*

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tiff, in addition to other insurance effected on stock, a payment *ex gratia* one-third of amount claimed, and took from the plaintiff a release "in full discharge of all claim." The plaintiff contended that this release was given by him in relation to other insurance. In an action for the insurance under the policy less the payment made—

Held—That the evidence disclosed the existence of a substantial interest in the premises by the plaintiff at the time of the loss ;

Held—That the plaintiff was not estopped by his release and might show the circumstances under which it was given. The release was only evidence capable of being rebutted by other testimony. Estoppels ought not to be allowed unless plainly and clearly established. *Goss v. Guardian Insurance Company.*

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INTERFERENCE WITH FISHERY. *See FISHERIES ACT.*

INTESTATE ESTATE. *See INSOLVENCY.*

INTOXICATING LIQUORS—

License to sell intoxicating liquors on premises—License Act, 1875—Open after prohibited hours—Appeal.

The appellant, being licensed to sell by retail intoxicating liquors on his premises, was convicted of a breach of a section of the "License Act, 1875," regulating the closing of houses licensed for the sale of intoxicating liquors. The conviction was appealed from on the grounds : (1) The premises were not open ; (2) No business done ; (3) No liquor delivered or consumed ; (4) Premises being open not sufficient to warrant a conviction.

Held—The conviction was right. The section provides the premises must be *absolutely closed* within the prohibited hours. Here it was not denied they were open, although no business was done ; the door being open the premises could not be said to be absolutely closed. *Thomas O'Neil, in re*

581

Licensing Acts—Conviction—Selling liquor without license—Act of servant act of master.

Where the appellant was fined by the magistrate for selling liquor without a license. On appeal, it was contended for him, (1) That the liquor was sold by his wife ; (2) That there was no evidence that the liquor sold contained the percentage of alcohol by law required to bring it under provisions of licensing Act.

Held—The act of the wife is the act of her husband ; also, that where it is proven that rum was sold a magistrate may assume it was the well known liquor so described ; and that it was over the strength defined by the law. *Burke v. White*

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ISSUE AND LAWFUL ISSUE. *See* WILL.

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LIFE INTEREST. *See* WILL.

LANDLORD AND TENANT—

Lease—Agreement for extension — Ejectment — Specific performance—Injunction.

Where a lease was about to expire the tenant communicated with the landlord for an extension. The landlord, through his agent, offered an extension on certain terms. The plaintiff contended that he accepted in writing by a note to the agent the proposed terms. The proof of delivery of acceptance to agent was unsatisfactory. Previous to the expiry of the term, and on the assumption that his lease was renewed, the tenant sub-let portion of the premises for a term, and the agent of the landlord though not admitting the extension, drew up the lease between the tenant and sub-tenant. Term having expired, the landlord sought to eject the tenant. The tenant set up extension of lease and claimed specific performance.

Held—That proof of delivery to agent of tenant's acceptance of renewal terms was unsatisfactory, but in view of the privity of agent to the sub-letting by tenant there was evidence sufficient to establish that the extension had been concluded between the parties, and to entitle the tenant to specific performance. *Duchemin v. Des Barres*

522

Lease—Covenant—Payment of rent—Breach—Demand — Distress—Re-entry—Assignment by Lessor—Forfeiture.

In an action of ejectment under a lease containing a covenant to re-enter, it appeared that the tenant was in arrears of rent to a considerable amount, for which repeated demands had been made, and that there was not sufficient property on the premises to distrain. The defence set up was insufficiency of notice and demand, and that no distraint had been made.

Held—That the lessor is not bound to make a formal demand, but merely an effectual demand; that proof of insufficiency of distress removes the obligation to distrain. *Prowse v. Prendergast*

205

Lease—Destruction of property on land leased, by fire—Surrender of lease by note in writing—Local usages as to right of surrender of lease.

The defendant was the assignee and occupier of certain lands with buildings thereon, situate in the town of St. John's. The buildings were destroyed in July fire, 1892. The defendant in writing, within thirteen days after the happening of the fire, surrendered the premises to the plaintiff. Notwithstanding the surrender, the plaintiff sued for half year's rent. The defendant relied on his right to surrender though no covenant was in the lease providing for such surrender.

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LANDLORD AND TENANT—*continued.*

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Held—Under the English law the defendant would be bound to pay rent (without any exception in case of fire) though the premises were burnt ; but there is a local usage or established custom in Newfoundland which gives the right to surrender the premises as he did, and he is released from all obligation to pay rent. *Kitchen v. Fenelon* 740

Lease—Covenants, title and quiet enjoyment—Breach—Measure of damages.

The plaintiff, being in possession as tenant of the lessee for his unexpired term, entered into an agreement with the lessor for a new term of the premises. The lessor covenants that he had authority to demise, and covenanted for quiet enjoyment. The defendant lessor failed to put the plaintiff in possession. It appeared the rent paid by the plaintiff to the lessee was excessive, and that which he was to pay under the new lease, though much less, was only the value of the property.

Held—The action was not of a meritorious character in that both parties had been speculating as to the probability of the lessee losing the property, and thus perfecting a lease of mutual advantage. Having regard to the relations of the parties only nominal damages would be adjudged. *Davidson v. Des Barres.* 672

Lease—Construction—Way—Appurtenances—Common right of way.

Where the defendant leased a "shop and premises" to the plaintiff, having two doors abutting on two different streets, the defendant claimed a common right of way to and from the said premises through a third door which specially led to a dwelling house, portion of the same premises and occupied by another tenant of the defendant. The lease was silent on what the appurtenances to the shop and premises were. The defendant refused plaintiff the right to use the said door. In an action of replevin, the defendant having distrained for her rent,

Held—That the third door or passage was appurtenant to the dwelling house only and not to the "shop and premises." A way not strictly appurtenant will not pass under the words "all that shop and premises," unless it can be concluded that the parties intended to use those words in a sense more inclusive than their ordinary legal signification. *Keough v. Thorburn* 662

Covenant for renewal where there is a condition precedent—Holding over—Increased rent.

A lease of a house was granted in 1847 for a term of forty years. In 1859 an extension of ten years was granted, in consideration of the lessee erecting substantial stores in the rear of house leased. At the end of the forty years the lessor gave notice of an increased rent, regarding the lease then as terminated on the grounds that the stores had not been erected.

LANDLORD AND TENANT--*continued.*

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Held—That the performance of the covenant to build was a condition precedent to the lessees having a renewal. The covenant was not a demise *in presenti*. Having had notice of the increased rent the lessee must be held to have acquiesced with the new proposal and was bound to pay the increased rent.—*Flood v. Chancey*

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LAPSED LEGACY. *See* WILL.LEASE. *See* LANDLORD AND TENANT.

LEGISLATURE OF NEWFOUNDLAND—

Territorial dominion—Seizure of foreign ships—Forfeiture—Jurisdiction of magistrate.

The defendants (foreign fishermen) were proceeded against before a magistrate for violation of the "Newfoundland Bait Act, 50 Vic., cap. 1," viz., purchasing bait fishes for exportation and bait purposes without having taken out a license provided for in said act. The magistrate convicted the defendants, fined them and declared their vessels confiscated and forfeited. The defendants appealed on the grounds, (1) That the vessels were outside of the three-mile limit when seized, and there was no power to seize outside the territorial waters; (2) No exportation; (3) No power to board a ship under act; (4) No power in magistrate to confiscate vessels; (5) That the authority of our laws ended at low water mark. The Supreme Court sustained the decision of the magistrate, except on the question of the confiscation of the vessel, which was over-ruled, and

Held—(1) That the territorial jurisdiction extends to three miles outside a line drawn from headland to headland, and that the acts of the Newfoundland legislature have full effect in that territory; (2) That the terms and language of the act contains no authority to confiscate vessels or property; (3) That the indispensable conditions requisite to support a forfeiture are absent from the act; (4) When no procedure is pointed out for the recovery of penalties the proceeding must be by action in the Supreme Court. *Queen v. Delepine*

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LICENSE. *See* INTOXICATING LIQUORS.LOBSTER FISHERY. *See* MASTER AND SERVANTS ACT.MANDAMUS. *See* PRACTICE.MANSLAUGHTER. *See* PRACTICE.MARRIED WOMAN'S PROPERTY ACT. *See* INSOLVENCY.

MASTER AND SERVANT—

Contract—Parol agreement for commission outside wages—Construction of.

The defendant entered into an agreement with the plaintiff, who had previously served him as an apprentice, at a certain

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wage per day and an additional bonus in the shape of a commission on goods sold, to serve him as foreman in his business as an upholsterer. He served him for one year and then claimed his commission, contending he was entitled to five per cent. as per agreement on the gross proceeds of the business. This the defendant denied, and claimed the agreement for commission was only to attach to the net profits of the business. The agreement was entirely parol and there was no witness. In an action for the amount of the commission—

Held—That in the absence of any corroborative evidence on either side, the conclusion was in favor of the defendant, as the wages paid the plaintiff, added to the commission which the defendant admitted was due, would form a salary in keeping with the position of plaintiff and the wage earned by those in similar positions. *Ireland v. Daymond*

757

Contract—Breach—Dismissal—Notice—Damages.

A party residing in Scotland had come to Newfoundland under an agreement with the Newfoundland Government for five years, terminable at the end of the first year by either party giving to the other a three months' notice. At the end of the first year a notice was given by the Government terminating the agreement. In an action for wrongful dismissal,

Held—That to effectually terminate agreement at the end of the first year, the notice should have preceded that time, and damages were given accordingly. *Scott v. Government of Nfld.*

231

Contract—Breach—Dismissal—Damages.

The defendants, lobster packers, engaged the services of the plaintiff in the month of June as superintendent of one of their lobster factories, giving him control of the factory and fishermen. In July he was dismissed by a note from one of the defendants on the grounds, amongst others, of his refusal to cease "taking account of lobsters" where a man had been appointed by defendants to do this special work, under the plaintiff. In an action for wrongful dismissal, in which the refusal to obey the orders referred to was not denied,

Held—That the refusal was justified, in that the servant was superintendent of the factory and fishermen, that in the successful carrying out of his duties, his own business reputation was at stake, and any interference with him was a breach of agreement by the defendants. *Cook v. Stabb and Roche*

240

Maliciously instigating master to discharge servant—Right of action—Special damages—Appeal.

Where a hired shareman was engaged to proceed to Labrador with a dealer and freighter of the defendant, the latter refused to allow his master to take him in the vessel. No reason was assigned for refusal. The plaintiff was prevented from conti-

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nuing in the service. In an action for damages against the defendant, in supporting the judgment of the magistrate on appeal, the court

Held—That the procurement of loss or damage to another by instigating masters to discharge their servants is actionable. That there is no distinction between the principle, of instigating a master to discharge his servant and that of instigating a servant to leave his master. Appeal dismissed. *Russell v. Mercer*

307

Contract—Breach—Minor—Covenant not to marry—Dismissal Damages.

The plaintiff, an infant, had come from Jersey to Newfoundland under articles of indenture, a covenant of which prevented his marrying. He was dismissed by his employer for breach of the above covenant. In an action for wrongful dismissal—

Held—That the covenant was an independent one, and its breach did not dissolve the articles of indenture, and that his employers were bound to take him back. The measure of damages would be the time he was out of service. *McKay v. Renouf, Clement & Co.*

229

Damage to house and crops—Setting fire to forest—Act of defendant's servant.

Where the defendants had gone into the country and had left a boy to make in a fire, directing him to light the same. The boy, exercising his judgment, had kindled the fire in the woods, and not on the road as directed. The fire almost immediately caught the woods and ultimately spread to the plaintiff's house and crops, which it destroyed. In an action for damages it was contended there was no liability in that there was no proof of negligence, and that the act was the act of the servant, not within the scope of his authority.

Held—That the defendants were responsible for the act of their servant, the lighting of the fire being within the scope of his authority, the manner of doing it was not to affect the rights of the plaintiff. The fact of the woods catching on fire was a presumption of negligence. *Percy v. Butler and Jerritt*

237

Sealing agreement—Shareman—Partnership—Participation of crew in proceeds of seals taken on Sunday, in the capture of which they refused to join.

Sealers contracted to serve the owners of a sealing ship as their crew, and for remuneration were to receive one-third of the catch. Thirty-five of their number declined to obey the orders of the captain "to kill seals on Sundays." A considerable quantity of seals were taken on these days. The owner of the ship refused any part of the proceeds of the seals taken on Sunday to those who did not participate in the capture of

MASTER AND SERVANT—*continued.*

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the same, but allowed a sum as labor for the stowing of the same on the following days. In an action those of the crew who had declined to work claimed to share in the voyage equally with the crew who had worked on Sunday.

Held—The crew were only entitled to share in the proceeds of the seals in the capture of which they had participated.—There is no law which relieves sealers from going on the ice because of the sanctity of the Sabbath, or justifies their refusal when so ordered. *Richards v. Job, Brothers & Co.*

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MASTERS' AND SERVANTS' ACT—

Certiorari—Habeas Corpus—Master and servant—Abandonment of fishery—Masters' and Servants' Act—Application to lobster fishery.

Fishermen under an agreement to fish from their homes, in their own boats, for lobsters during the fishing season, took up their lobster traps in the middle of the season and refused without sufficient cause to further prosecute the fishery. On a complaint the magistrate, under the "Masters' and Servants' Act," sentenced the defendants to imprisonment. On an application for a *certiorari* and rule for a *habeas corpus*—

Held—That the statute contemplated no such relationship as that created by defendants' agreement; and only such as involve the immediate personal control of employer and the personal service and subjection of employee. The agreement is simply a contract, and does not constitute the relation of master and servant.

Held—That under the "Masters' and Servants' Act," where the servant commits a breach of his agreement and is brought before the court and is prepared to go back to his service, he is relieved from the penal consequences of imprisonment. *Ex parte Costigan v. Murphy*

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MECHANICS' LIEN ACT—

Construction of—Notice by workmen to owners of property of non-payment of wages by contractor—Proceedings "in rem" and "in personam."

A contractor agreed to build a premises for the defendants, the contractor to pay all wages for labor. The contractor became insolvent after having obtained from the defendants the full amount of his contract price. The defendants had to pay to another party an additional sum to complete premises. The plaintiff was employed on the work by the contractor, and when the latter became insolvent was owed a portion of his wages; no written notice under the Mechanics' Lien Act was given the defendants by the plaintiff, though the former were told that moneys were weekly due them by the contractor. In an action by plaintiff against the defendants judgment was

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given in his favor. The defendants appealed, and claimed that they could only be liable, if liable at all, for a proportionate share of the sum they were entitled to retain under the Act; they also relied on the want of notice and the absence of jurisdiction in the court below.

Held—That the judgment of the court below could not be confirmed. The action was by summons *in personam* against the owner, which the Act does not authorize. The whole scope of the Act has reference to proceedings *in rem*, which the term lien implies. *Lynch v. Trainer*

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MERCHANTS' SHIPPING ACT. *See* SHIPPING.MISTAKE. *See* PRACTICE.

MORTGAGE—

Policy of Insurance—Assignment of under deed of mortgage—Rights of attaching creditor—Mortgage not being registered.

Where property of mortgagor was insured and policy held by, though not formally assigned to mortgagee, property being destroyed by fire, the insurance was attached in the hands of the company by a creditor of the mortgagor. The mortgage, previous to the destruction of the property, was not registered, nor had the company notice of the assignment of the policy. On a case submitted for the opinion of the court,—

Held—That the benefit of the policy passed to the mortgagee. The attachment in no way affects his rights. *Kenny v. Hutchings; McPherson v. Queen Insurance Company*

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Power of sale—Proviso that power was not to be exercised without notice and default—Assignment of mortgage to third party—Redemption by mortgagor after foreclosure and sale.

A mortgage deed contained a covenant to pay at the expiration of three, five or seven years, and a power of sale in the usual form, with a proviso that the power should not be exercised till two months' notice in writing had been given. The mortgagor made default in the payment of the principal and interest. The mortgagee gave the notice under the mortgage, and subsequently sold the premises to a purchaser. The property, though offered at public auction, was disposed of at private sale and below its value,—

Held—In an action by the mortgagor to set aside sale, that the notice of default having been given before default was made, could not be made to operate for the exercise of the power. The agreement as to sale was to be by public auction, whereas the purchase was made by private sale. The purchaser was bound to see the terms of the sale fell within the limits of the power. Sale set aside and mortgagor allowed to redeem. *Parsons v. Ryan*

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MORTGAGE—continued.

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Mortgage of stock—covenant substitution for and addition to—Supplying renewals of stock in ignorance of mortgage—How far mortgagor is agent of mortgagees.

Goods were supplied to a party engaged in general commerce, and went in addition to and substitution of stock previously mortgaged. Goods were sold in ignorance of the mortgage, which was registered. Mortgagor became bankrupt. In an action by the seller of the goods against the mortgagees, on the ground that the goods were furnished to the mortgagor as agent of mortgagees,—

Held—That the mortgagees were not liable under the mortgage; nor was the mortgagor their agent, no such relationship having been disclosed at the time of the making of the purchases. The mortgagor was only the agent of the mortgagees for the purposes of the mortgage, and had no power to pledge their credit. *Browning v. Pitts, et al*

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MUNICIPAL ACT, 1888—

Construction of—Laying down pavement—Jurisdiction of magistrate—Appeal.

On a complaint by the chairman of the St. John's Municipal Council against the defendant for not laying a side walk, the magistrate held he had no jurisdiction to try complaint.

Held—On appeal, that under section 28, cap. 80, con. stat., the magistrate has jurisdiction to try complaints for the non-feasances under section 15. *Power v. Hunt*

584

Municipal authority—Control of side-walk—Power to modify material used in same—Action for cost of laying down side-walk.

Under the municipal law the "proprietor" of each house was liable to lay down a side-walk of stone or plank in front of same. The defendant not having complied with the law, the Council laid down a block pavement. The defendant contended that his tenant was liable under his lease and under the law, and that the law does not call for a block pavement, and that the Council has no remedy in the present action.

Held—That the defendant is the "proprietor" within the meaning of the law, and was liable; that it is within the province of the Council to modify and alter the material to be used in the construction of a side-walk. The Council has no power to lay down a side walk and sue for cost of same. The remedy is by indictment for non-repair or action for the penalty. *Municipal Council v. Stabb*

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Highway—Negligence—St. John's Municipal Council—Duties of—Bridges—Repair of—Non-repair—Non-feasance—Injury to person—Death resulting from—Liability for—Contributory negligence.

MUNICIPAL ACT, 1888—*continued*

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The St. John's Municipal Council, established under 51 Vic., cap. 5, and having thereunder the control and management of roads, highways, &c., in relation to the making and repairing of the same within the municipal limits, neglected to repair a bridge, the rail of which had broken away, in consequence of which a youth, whilst playing with companions, fell over into the river and sustained injuries which resulted in death. In an action under a local act, which is a transcript of Lord Campbell's act, by the administrator of deceased claiming damages against the municipality for (a) neglect in repairing the bridge, and (b) leaving the same in an unsound and dangerous condition. The judge before whom the case was tried left to the jury the issues, who returned a verdict for the plaintiff. On a motion that verdict be entered for defendants on the ground, (1) contributory negligence; (2) not bound to repair; (3) the bridge outside jurisdiction; (4) no appropriation of funds:

Held—Whoever undertakes the performance of duties by the assumption of office is liable for negligent discharge of same. The accident occurred within the jurisdiction of defendants, and if it had not been clearly established as it was that the deceased met his death by his own negligence, the liability of the defendants would be sustained. *Carleton v. Municipal Council*

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NEW TRIAL. See PRACTICE.

PARTNERSHIP—

Death of partner—Share of deceased partner, how ascertained—Fiduciary relation—Bill for an account—Parties—Statute limitation.

Under a deed of partnership for general business, it was provided that at the end of each year an account should be made and signed which should be binding on all parties. In the event of death co-partnership to be continued by survivors till end of current year of such decease, and within one year from decease balance due deceased party is to be paid to his representative. Last statement signed to be taken by all as value of assets. One of the co-partners died. The administratrix of the deceased partner filed a bill for an account, but the other partners refused fairly to account: (1) As to the private estate of the deceased partner, which was debited with the purchase money of certain properties which, in the last account signed (in lifetime of deceased), had been placed amongst partnership assets; (2) That there was a fraudulent disposition of partnership assets to the loss of estate of deceased. It appeared from the books of the partnership that the property in the first item was charged in to the partnership in the handwriting of deceased, and that the property said to be fraudulently disposed of was sold at public auction for and on account of estate partly purchased by one of the surviving partners,

PARTNERSHIP—*continued.*

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Held—(Pinsent, J., differing)—That the signed admission, the terms of the co-partnership, and the full knowledge by all the parties of the circumstances was sufficient to justify the debiting of the partnership account with the purchase money sought to be charged to estate of deceased partner.

Respecting the charge of fraudulent disposition of partnership assets :

Held—(1) There was no fiduciary relation between surviving partners and representatives of deceased partners—there are legal obligations binding on both ; (2) Statute limitations applies as between any other persons ; (3) The right of a surviving partner to the partnership assets is absolute—that of the representatives of a deceased partner—to an account ; (4) One partner may lawfully purchase the share of a deceased partner ; (5) There was nothing in the conduct of the surviving partners or auctioneer to warrant the imputation of fraud or collusion.

Browning v. Browning 161

Parol agreement — Breach — Statute of Frauds — Part performance—Statute of Limitations.

It appeared that in the year 1876 the plaintiff, being a mineral prospector, entered into a parol agreement with defendants that in consideration of his and defendant (Henderson) imparting to the defendant (Cleary) certain information relative to mining locations, the latter was to take out, at his own expense, licenses for the same, and the three were then to be conjointly interested to the extent of one-third each ; that applications for licenses for said lands were made in said year by the said Cleary, and in 1878 refused by the Governor in Council. Of this decision the plaintiff and Henderson were informed. Nothing appears to have afterwards transpired relative to the said agreement. In 1878 Cleary, on his own account and in his own name, applied for and was granted in 1881, a license for one of the locations applied for in 1876. This property was sold by Cleary for \$13,000, and a suit taken by the plaintiff for a decree for specific performance. The defendant (Cleary) denied the agreement, and pleaded the Statute of Frauds, *i. e.*, no agreement in writing, and the Statute of Limitations.

Held—(Pinsent, J., differing)—That the parties were distinctly at issue as to what the contract was, and the object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties had failed to make distinct by reducing into writing ; that the act of part performance relied on must be unequivocally referable to the agreement as that alleged ; this element, which is necessary to take agreement out of the statute, was absent ; that the license of 1881 was not the outcome of the application of 1876, nor was the lease to Cleary the result of the same. *Tilley v. Cleary*

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PARTNERSHIP—*continued.*

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Dissolution of—Bill for account—Joint proprietors.

The plaintiff entered into an alleged mining co-partnership with the defendant for the purposes of mineral explorations, and agreed to contribute a sum towards the cost of the undertaking, a portion of which he paid. Eventually the enterprise was abandoned, and the titles to property allowed to lapse and become forfeited. The plaintiff filed a bill for an account of the partnership and prayed for a decree for the dissolution of the same. It appeared that the plaintiff had given notice to the defendant of the dissolution of the alleged partnership. The defendant denied any partnership, and contended that the plaintiff was a co-proprietor in the mining properties.

Held.—Where there is no fixed term for the duration of a partnership any partner may retire from it at any time by express notice to his co-partners. The partnership was long ago dissolved by the expiry of the business and the extinction of the rights of property. Decree and account refused. *Walsh v. Scanlan.*

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PETITION OF RIGHT. *See* CROWN.POLICY OF INSURANCE. *See* INSURANCE.POST OFFICE ACT. *See* CONTRACT.

PRACTICE—

Appeal—Mandamus to Inferior Court to complete papers and grant appeal.

Where it is shown to the satisfaction of the Court that an inferior tribunal has adjudged against a party, and where an appeal lay, refuses to complete the necessary papers and grant the appeal, the Court will direct a mandamus to issue ordering the record of the Court below to be sent up for hearing.

Policy of insurance—Arbitration clause—Rule nisi for stay of proceedings—Order for arbitration—Award, a condition precedent to right of action.

A trader insured his vessel in a Mutual Insurance Club, the rules of which contained a clause to the effect that if any difference should arise between the parties, such difference should be referred to arbitration, and such arbitration was a condition precedent to the right of the insured to maintain an action. The insured refused to appoint an arbitrator and insisted on prosecuting his action for his insurance, contending that the arbitration clause or rule was illegal and void and ousted the court of its jurisdiction. The defendant company obtained a rule nisi for a stay of proceedings and a reference to arbitration. On coming up for argument—

PRACTICE—continued.

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Held—That no action could be brought until every dispute that might arise under the policy had been settled by arbitration. Parties may in a contract make what they please a condition precedent, but it must be shewn that they so intended. Reference to arbitration ordered accordingly. *McDougall v. Grieve*

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Bail—Murder—Postponement trial—Indictment found for acquittal previous trial.

Where an indictment was found for murder against a number of prisoners, application was made to postpone trial on the grounds that the witnesses for defence would be away at date of trial, and, being a considerable number, if detained, serious loss would result to them.

Held—That under the unprecedented circumstances of the case a postponement would be granted and bail taken for prisoners in certain cases.

Contract—Counter-claim—Time allowed to prosecute—Rule to dismiss or strike out.

The Newfoundland Railway Company had succeeded in an action against the Newfoundland Government in obtaining a judgment for annual subsidies and grants of land attaching to each five-mile section of road completed. On appeal to Privy Council the Government was adjudged the right to counter-claim for damages for breach of contract. The Government proceeded to take evidence to substantiate their counter-claim. Meanwhile the annual subsidies were tied up, pending the judgment on the counter-claim. The Company moved that, as a reasonable time had been allowed to the Government to establish their counter-claim, and they having failed to bring it forward, that it be stricken out.

Held—That all arrears of subsidy be paid, and all that may accrue till final adjudication, and that the motion to strike out counter-claim be disallowed. *Newfoundland Railway Company, et al, v. Newfoundland Government*

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Pleadings—Deceit—Misrepresentation—Declaration—Demurrer.

In an action of deceit to recover the amount paid towards the formation of a company on the representation that the company was to be managed in St. John's, whereas it was to be managed in Liverpool. The declaration was demurred to on the grounds that it failed to show that the party had taken the shares through the particular representation, or that he had lost anything by having the shares or by mismanagement in Liverpool, and that the alleged misrepresentation was an innocent one.

Held—Facts which are the materiality of the inducement must appear on the pleadings. In actions of deceit the es-

PRACTICE—*continued.*

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entials, i. e., the facts constituting falsity of representation, knowledge of the person making it, assertions known to be unfounded, representations acted upon, damage resulting, must appear on the declaration. *Murray v. Bowring* . . .

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Pleadings—Demurrer—Bill of Lading—Contract—Breach of—Negligence—Damages.

Certain goods which were being carried under a contract of affreightment, became damaged. The owner sued for damages, alleging negligence. As an answer the bill of lading was pleaded, containing certain exceptions limiting the carrier's liability. This plea was demurred to on the grounds that it did not disclose the fact that the damage came under any of the exceptions in the bill of lading.

Held—That the defendants were not called on to allege the particular cause from which the damage arose. They satisfy the practice in setting forth the exceptions which qualify their liability. *Carbonear Water Company v. Allen, et al* . . .

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Fraud—Facts constituting—Cancellation deed of composition—Bill of complaint for—Demurrer.

Where a banking company entered into an agreement with a customer to accept nine shillings in the pound for his indebtedness; it afterwards appeared that the agreement was made in ignorance of the customer's assets and liabilities. A bill of complaint was filed, in which the customer was charged with fraud and misrepresentation, and prayed for the cancellation of the deed and payment in full of the original indebtedness. Demurrer on the ground amongst others, that the bill contained no particulars of fraud or misrepresentation, and was erroneous in seeking for payment in full of original indebtedness.

Held—That where fraud is charged, there must be a sufficient averment of the facts which make up the charge.

Held—Also, that nothing would be done in equity more than to place the parties in the position they stood in prior to the composition. *Union Bank of Nfld. v. Francis McDougall, et al*

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Contract—Declaration—Demurrer, illegal consideration—Suppression of prosecution.

An employee of the plaintiff bank had been arrested and charged with making false entries in the books of the bank, and was about to be prosecuted for the same. The defendants agreed with the plaintiff that, in consideration of the release of the said employee, they would pay to the said bank amount due by said employee not exceeding a certain sum mentioned. The plaintiff released the employee. The defendants refused to pay the sum agreed on. In an action on the agreement, the

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defendants demurred that the consideration set out was for the doing of an illegal act, and that the agreement was therefore void.

Held—That all agreements for the purpose of “stifling prosecutions” are void, whether the offence be a felony or misdemeanor, except in the case where the party has the option of prosecuting in a civil action or by public prosecution. When the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution. *Union Bank v. Hutton and Bradshaw* 290

Pleadings—Incomplete administration must be pleaded—Not ground for non-suit.

In an action of trover incomplete administration was put forward as a ground on a motion for a non-suit.

Held—That want of perfected administration should have been pleaded and not as a ground for non-suit. *Sommerville v. Brien* 41

Indictment—Essentials of—In perjury—Judicial proceedings—Amendment—Arrest of judgment.

The prisoners were tried and found guilty on indictments for perjury in attempting to sustain by oath a document which was not the testator’s will. In neither indictment was the pendency or contemplated institution of judicial proceedings set out. On coming up for sentence, counsel moved in arrest of judgment that it did not appear on the indictments that the oath was taken in a pending or contemplated judicial proceeding.

Held—That to constitute perjury the false evidence must be given in the course of a judicial proceeding, and must not alone be proven at trial but must appear on the face of the indictment. *Queen v. Kennedy; Queen v. Butler* 91

Writ of ca. sa.—Arrest—Irregularity—Rule nisi to set aside writ—Illegality of proceeding.

A judgment was given against a party at Burin in the Supreme Court on Circuit, on which judgment he was afterwards on a *capias ad satisfaciendum* arrested and lodged in jail at Ferryland. On application to have writ and proceedings had thereunder set aside and the prisoner discharged, on the grounds of irregularity of process and illegality of proceeding, it appeared that the form of *fi. fa.* prescribed for Circuit Court practice, and which proceeded the *ca. sa.*, had not been followed, and it differed materially from the one used; it also appeared that the sheriff’s officer surrendered the prisoner before bringing him to Ferryland by lodging him with the jailor at Burin, and afterwards took him out of the said custody.

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Held—(1) That the procedure, subsequent to the issuing of the *capias*, was irregular, in that the forms prescribed for the Supreme Court on Circuit were not followed ; (2) The sheriff's officer, after surrendering the prisoner to the jailor at Burin, was not warranted in afterwards re-taking him without further authority. *Pike v. Pike*

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Prohibition—Rule nisi—Jurisdiction of magistrate—Question of title — Public Beach — Obstruction to — Prescription — Rights against Crown— Use and occupation.

A party charged before a magistrate for obstruction to public beach set up title (1) By prescription ; (2) By occupation ; and that the complaint involving a question of title, the magistrate's jurisdiction was ousted. The magistrate continued to hear complaint. Defendant obtained a *rule nisi* on the magistrate to shew cause why a writ of prohibition should not issue restraining him from adjudicating in the matter. On coming up for argument,

Held—That the magistrate was justified in proceeding with the hearing to ascertain the rights of the crown and the defendant. That his jurisdiction is not ousted by a mere assertion of title. The court must enquire fully into all the circumstances before it can be satisfied that the title does come in question. *In re James Lewis*

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"Companies' Incorporation Act, 1873"—Mandamus to Company to elect Directors.

Under the Companies' Incorporation Act, 1873," the Newfoundland Consolidated Copper Mining Company was incorporated. Certain bye-laws were adopted by the company, one to the effect that the annual meeting should be held in July. Disregarding this bye-law, a meeting was called in April at which the directors present were re-elected on the motion of the only shareholder present. On an application by a shareholder for a mandamus to the company to elect legally the directors,

Held—That no meeting for the election of new directors can be valid during the period for which the former directors had been elected. *Ex parte McGibbon.*

417

Mistake—Stay of execution — Injunction — Reform of written agreement.

The defendant agreed with the agent of a planter to proceed as shareman in the fishery on Labrador. Some time after, and before leaving for Labrador, the agent signed and handed by mistake to defendant an agreement that he was to receive wages. The defendant proceeded to Labrador under the written agreement, but the agent having discovered the mistake, notified the defendant of the same some days before the ope-

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ning of the fishery. The defendant continued in the service until the end of the voyage, and sued the planter for wages under the agreement. The magistrate gave judgment for the defendant. The planter filed a bill for a stay of execution and perpetual injunction on the grounds that the defendant was not a shipped servant but a shareman.

Held—That the mistake was clearly established, so as to justify the reforming of the contract in conformity with intention of parties. Order for injunction made absolute. *Job Brothers & Co. v. Normore*

371

New trial—Verdict against evidence—Principle on which new trial allowed.

The plaintiff sought to recover \$900, balance of account covering several years transactions. The defendant counter-claimed for proceeds of certain shipments of produce not accounted for. Plaintiff answered counter-claim that produce had been shipped to a firm which became bankrupt before proceeds were accounted for. The defendant answers that plaintiff was not their forwarding agent; that the produce was shipped to plaintiff's own account; that proceeds entered into account between plaintiff and the bankrupt firm; and that the commission charged by plaintiff was a *del credere*. The jury found a verdict for defendant, disallowing his counter-claim. Upon a rule for a new trial on the grounds, (1) Verdict contrary to evidence; (2) Mis-direction; (3) Non-direction,

Held—(Pinsent, J., differing)—A new trial ought not to be granted on the grounds that the verdict of the jury was contrary to the weight of evidence, unless the verdict was one that the jury, weighing the whole of the evidence reasonably, could not properly find. Rule discharged. *Corbett v. Foote*

276

License Acts—Magistrate's decision—New evidence—Appeal.

Where a party having been convicted of a breach of the License Act, on the evidence of a hired informer, appealed from the magistrate's decision and tendered the evidence of the informer to contradict what he had sworn to in the court below, and also evidence of witnesses not previously called.

Held—That to establish such a practice would be to encourage perjury and the getting up of corrupt defences. A case may be remitted back on the discovery of important evidence not available before. It would be unfair to reverse a decision on evidence which the tribunal convicting had no opportunity of considering. *Thomey v. Forward*

119

Pleadings—Petition under 46 Vic., cap. 16—Demurrer to—Crown grant—Setting aside of.

Under 46 Vic., cap. 16, (local Act), "to facilitate trial of questions relating to Crown grants," a petition was filed pray-

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ing that a certain grant made by the Crown might be set aside as void or that it be amended. Petitioner had purchased property, a portion of which it was alleged was covered by Crown grant. The grantee appeared to have had a title against the Crown before the grant was issued, and the grant so issued was superfluous and *ex gratia*. Petition was demurred to on the grounds of insufficiency in law, in that the averments did not establish a case contemplated by 46 Vic., cap. 16.

Held—That 46 Vic., was designed to supply the English remedy by *scire facias*, but that petitioner had failed to establish a case in which a *fiat* would *ex debito* have gone for a *scire facias*. An action of trespass or ejectment would fitly meet the case. The Act was intended to meet cases where grants were obtained by fraud, concealment or mistake, or issued to the detriment of the rightful grantee, or where an applicant with the better right has been deferred in favor of another. No irregularity had been shown in the issue of the grant to call for the avoidance or correction of same. *Smith v. Morris*.

155

Homicide—In defence of one's parent.

Where it appeared that the prisoner, observing his father violently engaged in a row, which the latter had provoked by drunken abusiveness and threats, and in which he was being seriously assaulted, struck at the party assaulting with his knife, which shortly deprived him of life.

The Court was of opinion—the grand jury having found a verdict of wilful murder, and the prisoner having pleaded guilty to the lesser crime of manslaughter—that the Crown was justified in accepting the plea, and abandoning the charge of wilful murder; and that the act having been committed in defence of a parent was a mitigating circumstance. *Regina v. Hollett*

29

Chose in action—Requisites in plea of assignment of—In action for.

Where judgment was obtained in a foreign court, the party obtaining the same sued upon it. The defence set up was that the judgment had been assigned before action brought, and notice given defendants of such assignment and claiming the amount of the judgment. The plea did not set out the names of the assignees.

Held—On demurrer, that the plea was bad, in that it should have disclosed the names of the assignees. The debtor should be apprised to whom he is to make payment. *Harrison v. Newfoundland Railway Company*

46

Practice—Murder—Trial—Motion for postponement.

During a special term of the Supreme Court holden for special business, a true bill was found against the accused.—

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upon application for postponement of trial on several grounds, the court

Held—That it being a special term was sufficient to concede to the motion for postponement. Want of time to prepare defence, absence of witnesses and illness of accused, are good grounds why the Crown should not force accused to trial.—*Queen v. Parnell*

402

Solicitor—Articled clerk—Abandonment of service—Service de novo—Reckoning detached periods—Mandamus to benchers to inquire into fitness of articled clerk.

In July, 1886, M. was articled to one Davis, a solicitor, and duly served him until November, 1887, when his articles were assigned to Sir Wm. Whiteway, Q. C., whom he served until October, 1888, when the service was terminated. In September, 1890, he became again articled to Sir J. S. Winter, Q. C., and served up to May, 1892. An application was then made by him to the benchers of the Newfoundland Law Society to enquire into his fitness to act as solicitor. He was refused admission on the grounds that the break in the service from 1888 to 1890 constituted an abandonment of the service necessitating a service *de novo*. M. obtained a rule *nisi* on the benchers, calling on them to shew cause why a *mandamus* should not issue commanding them to enquire into his qualifications. On the argument it was contended for the benchers that, having exercised their judgment, no power lay in the court to grant the writ: that the writ can only issue to compel the performance of a duty which has not been done, and not for the undoing of an act which has been done.

Held—That the writ of *mandamus* would lie, and that the benchers be directed to proceed with the application; that the service being shewn to be fully completed, though not continuously, the intention of the Act was complied with. The court will grant the writ when there is an absence of finality in the hearing of the application, and when it appears the benchers have confined their attention to a part of the application only. *Ex parte Morine*

721

Execution, stay of—Trespass—Title—Uninterrupted occupation for twenty years.

The plaintiff's husband had, thirty years previous to 1889, caused erections to be made on a property situate at Labrador, and carried on business there from 1857 to 1877. That after the death of her husband, plaintiff leased the property to different parties. That in 1883 the defendant committed a trespass by taking possession of the property and holding it to date of action. The defence set up was an uninterrupted possession and occupation of the property, prior to the occupation of plaintiff's husband, for over twenty years, and since then that plaintiff's husband and other occupiers were tenants of the

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defendant. Considerable conflict of testimony appeared. In giving judgment for the defendant, the court

Held--That a stay of execution would be granted till some arrangement could be arrived at as regards compensation for the erections placed on the property by the plaintiff, on the grounds that defendant was at fault in not having an agreement for such valuable property reduced to writing. *Gordon v. Gordon*

394

Practice—Rehearing—Right to call further testimony.

Parties may, on rehearing under section nine of the Judicature Act, 1889, call further testimony than that called at the original hearing before a single judge. *Levi March v. the Government of Newfoundland*

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PREFERENTIAL CLAIM. *See* INSOLVENCY.

PREROGATIVE OF CROWN. *See* CROWN.

PRINCIPAL AND AGENT—

Principal and agent—Excess of authority—Liability of principal—Requisite authority to sign lease.

An agent of a trustee, residing in Newfoundland, for an estate in Newfoundland, undertook to renew leases which had expired, for long terms of years. For doing so he had no authority except instructions contained in letters from his principal, not under seal, though in other respects the homologation was complete. To the leases so granted he had attached seals. The law of Newfoundland does not require any such formality to render valid a lease. The trustee having for several years received the rents under the new leases sold the property and ignored the tenants holding under the new leases, as if no leases had been granted, principally upon the grounds that an authority to an agent to execute a document under seal must be given under seal. In an action of ejectment by a purchaser over the heads of the tenants,

Held--Where a seal is not necessary to a lease as in Newfoundland the principal will be bound if the agent execute it; even though the agent attach a seal, the seal will have no effect. *Conference Methodist Church v. Goodall*

367

Principal and agent—Excess of authority—Liability of principal—Authority requisite for agent to sign lease—Unauthorized act of agent ratified by principal.

In the year 1890 the plaintiff purchased at public auction, from the surviving trustee of Thomson's estate residing in Scotland, the fee-simple in a property situate on Water Street in the town of St. John's. It subsequently appeared that in 1872 the agent of the estate who resided in Newfoundland had

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granted to the defendant, for a long term of years, the said property, and executed the lease as the attorney for the estate.—This lease the trustee repudiated, and contended that the agent had no authority to grant a lease; had no power of attorney or other document under seal, although the lease he had executed was under seal. It appeared from the evidence of letters and rent rolls that the granting of the lease had been brought to the notice of the trustee by the agent. In an action of ejectment by the purchaser against the tenant in possession—

Held—That the granting of the lease having been brought to the knowledge of the principal, it was his duty to repudiate the same if the agent had not authority to execute it. Here the act of the principal was an adoption and ratification of the act of the agent. An authority by parol to an agent to let or dispose of property is as effectual in Newfoundland as the most formal deed. *Wadden v. Wadden*

795

Principal and agent—Master and servant—Supplier—Receiver of voyage—Lobster fishery—Insolvency—Appeal.

The plaintiff was a shipped servant to one Savage in the lobster fishery. At the end of the fishing season Savage was unable to pay the amount of wages agreed upon by reason of the failure of the fishery, and the plaintiff looked to the defendant for his wages, on the grounds that he was the principal in the business and Savage merely his agent; that he was the receiver of the voyage, the supplier of Savage, and that Savage being insolvent he was liable.

Held—(Affirming the Court below on appeal)—That the defendant was not the contracting party and could not be held liable; that Savage was proprietor of the business, and there was no agency. It was doubtful if the defendant could be held liable in such a business, under any circumstances, for Savage's contracts, even to the extent of the "voyage" received. *Greeley v. Monroe*

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PRIVILEGED COMMUNICATION. *See* DEFAMATION.

PRIVILEGED CREDITOR. *See* INSOLVENCY.

PROHIBITION, WRIT OF. *See* PRACTICE.

PUBLIC USER. *See* WAY.

RAILWAY CONTRACT. *See* CONTRACT.

RAILWAY COMPANY. *See* COMPANY.

RECEIVER OF VOYAGE. *See* INSOLVENCY.

REGISTRATION. *See* INSOLVENCY.

REMAINDER. *See* WILL.

REVENUE—

*Customs' Management Act — Construction of — Violation of—
False reports — Seizure vessel and goods — Detention — Fine—
Damages.*

The plaintiff, prosecuting a trading voyage on the Labrador and Newfoundland coasts, was seized by a customs' officer for making false reports, passing a port of entry having on board dutiable goods not entered, and for other violations of the customs' law. A fine of \$400 was exacted under compulsion, and goods on board confiscated. In an action for damages for wrongful seizure, the jury found that the law had been violated, but that the fine had been exacted under compulsion. The plaintiff moved to have the verdict on the law issues entered for him, and the defendant on the main issues as well as on the finding in favor of plaintiff. The plaintiff relied on the grounds (a) no importation; (b) no authority to seize; (c) no right on Labrador to seize more goods than sufficient to pay duty on cargo not entered; (d) that there was an appropriation without an adjudication.

Held—(1) There was an importation contemplated by the Act, that is "a bringing in of goods; (2) that the officer, being a tide-waiter for the colony and acting under official instructions, had power to seize. His power is not limited to the precinct to which he is nominated; (3) the whole of the Customs' Management Act applies to Labrador in addition to the sections specially applying to that dependency; (4) plaintiff lost all right to possession of goods as soon as they became subject to forfeiture; (5) the fine cannot be allowed as it was not voluntary or free. *Pitts v. O'Dwyer, et al*

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*Customs' Management Act — Construction of — False reports—
Seizure—Fine—Detention—Damages.*

The plaintiff, prosecuting a trading voyage on the Labrador and Newfoundland coasts, was seized by a revenue officer for making false reports of goods on board his vessel. Penalties under the Act were imposed on plaintiff. In an action for damages the jury found for the defendants. On a motion for a new trial on the grounds that the vessel was not liable to seizure, and no authority to arrest and detain vessel,

Held—That it is a necessary incident to seizure of goods which have become forfeited that the offending vessel should be taken and detained for a reasonable time. A vessel is not free from subsequent seizure because she has made an entry upon a false report; and especially is this true upon a substantive offence. *Arnould v. O'Dwyer*

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REVOCATION. *See* WILL.

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ROAD COMMISSIONERS—

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Drain—Damages—Misfeasance—Nonfeasance.

A Road Board, appointed under Act of Parliament, constructed but left unfinished a public drain, which caused water to flow into and on a neighbouring proprietor, and, in the winter season to render access to his premises difficult. In an action for damages it was set up as a defence that the drain had been begun when the plaintiff was chairman of the board; that on a new board being appointed they declined to finish the drain.

Held—That the board was a continuous body, irrespective of changes, and as such were liable. *Stone v. Ashford* . . . 89

Damage to fence and trees—Construction—Highway.

Where the defendant, a road commissioner, cut and damaged the roots of trees of a proprietor abutting on the public road whilst in the course of levelling the same, and undermined his fence. In an action for damages—

Held—That as the trees were planted since the road was constructed there was no liability, as the owner should have guarded against their roots intruding on the highway. As regards the undermining of the fence, the commissioner was liable for the damage. *Evans v. Bell* 564

SALE OF SHIPS. *See* SHIPPING.

SALVAGE. *See* SHIPPING.

SEALING AGREEMENT. *See* MASTER AND SERVANT.

SEALING LAWS—

Sealing laws, 55 Vic., cap. 2, section 2—Penalty—Information against firm—Mens rea—Withdrawal of previous information—Appeal by informer.

An information against a firm in the firm name is irregular; it is necessary to set out the names of the constituents of the firm in the information. It is not necessary to prove *mens rea* against the accused under 55 Vic., cap. 2, sec. 2. *McCowan v. Bowring Brothers* 872

SERVANTS OF CROWN. *See* CROWN.

SHAREMAN. *See* FISHERIES ACT.

SHERIFFS—

Act relating thereto—Construction of—Special deputation—Liability for.

On behalf of the trustee of the defendant (insolvent after the issue of the plaintiff's writ of attachment) it was contended

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that the sheriff, who had granted a special deputy, was liable to the trustee in insolvency for the goods attached, and that the trustee was not bound to look to the plaintiff or special deputy.

Held—The special deputy and plaintiff, after notice and demand and failure to account, are liable to be sued, failing their ability and that of their sureties to respond, the sheriff would be liable for any loss. *Bouring v. Dicks*

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SHIPPING—

Bill of Lading—Shipowner's liability where property is destroyed after landing but before taken away—Condition as to taking away—General usage and port custom.

By a bill of lading, made in the Dominion of Canada, certain goods were to be carried to the port of St. John's, in Newfoundland. The instrument contained, in addition to a long list of excepted risks, the following conditions :—(a) "That the carrier should not be liable for any loss or damage from fire from any cause and wheresoever occurring"; (b) "After discharge the goods should be at the risk of the consignee"; (c) "The goods were to be taken from alongside by the consignee immediately the vessel was discharged." In an action by the consignee against the shipowner for the value of the goods, it appeared that the goods were landed and stored and destroyed by fire on the day after they were so landed and stored. The defendants set up as a defence the conditions and exceptions in their bill of lading set forth, and that the destruction of the goods was from causes beyond their control. The jury found for the plaintiff, (1) That the plaintiff had not sufficient time to remove the goods; (2) That he used due diligence; (3) That the landing was for the convenience of both parties. On a motion by defendant the verdict of the jury was set aside and it was

Held—That the shipowner's obligation was performed by a delivery at the usual wharf. The shipowner is not bound to give the consignee notice of arrival and readiness to discharge, or a reasonable time to take the goods from the ship's tackles, the consignee is bound to take the goods as they are passed out of the ship. *Bennett v. Black Diamond Co.*

819

Charter party—Bill of Exchange—Acceptance for freight—Insolvency of drawer.

The plaintiffs under a charter party carried a cargo of fish from St. John's, Newfoundland, to Barbados for the defendants. The charter party stipulated that freight should be paid on "right and true delivery." The cargo was delivered. The master of the ship took a bill of exchange from the consignees, who were the agents of the defendants, on defendants. Before presentation of bill of exchange, the drawers, Louis and Sons, failed. The plaintiffs, in an action, looked to the defendants

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for the freight. The latter contended that they were not liable, as the plaintiffs had made themselves the creditors of the consignees by taking their bill of exchange, instead of cash, as provided by the charter party. That at the time of failure the consignees had funds of defendants on their hands.

Held—Where there is a charter party covenanting for payment of freight on a "right and true delivery" of the cargo at a foreign port, the freighter is not discharged, by the master taking from the freighter's agent a bill of exchange, if the bill be not afterwards honored. It is nothing more than an order on defendants. Credit was not given the agent by receipt of that order. Unless the plaintiff by his agent distinctly elected to accept a bill instead of cash, it would not operate as a payment which would relieve defendant from liability. *March, et al, v. Thorburn, et al.*

357

Charter party—Deviation—Authority of master to bind owner.

The plaintiffs vessel was chartered by the defendant government to ply and cruise in Placentia Bay only, on the bait protection service, for a period and at a rate agreed upon. Whilst at Placentia Bay she was ordered into Fortune Bay by the defendants, and went there with the alleged assent of the master of the schooner, the son of the plaintiff, and whilst returning from there to Placentia Bay, was lost. In an action for damages the defendants pleaded, (1) That the vessel was not hired for Placentia Bay only; (2) That the deviation was made with the consent of the agent of the plaintiff and with his knowledge, and exempted defendants from any liability.

Held—(Carter, C. J., differing)—The master had no authority to bind the plaintiff to the deviation, which was unjustifiable; the contract was for Placentia Bay only; the hiring conferred possession and control of vessel in defendants, and, the master being subject to the hirers' orders, the hiring was in the nature of a demise *pro tempore*. *Coady v. Government of Newfoundland*

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Shipping—Collision—Lights—Infringement of regulations for preventing collision at sea—Merchant Shipping Act—Beneficial owner—Registered owner—Consequential damages.

In an action for damages caused to plaintiff's schooner by colliding with the defendant's, and for consequential damages, it was proven that the defendant had no lights up at the time of the collision, which was an infringement of the regulations for preventing collisions at sea. The defendant contended that absence of lights had not misled the plaintiff, and that collision was caused by plaintiff's mismanagement. The defendant also contended that the plaintiff, being only the nominal or registered owner, he could not recover consequential damages.

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Held—If there be a defect in lights, the vessel with the defect must be held to blame unless she can show the defect could not have contributed to the collision. When a ship is placed in a position of peril by the misconduct of another ship, and her master, exercising his judgment, commits an error which contributes to the collision, he will not be held in fault.

Held—(PINSENT, J., differing)—The registered or nominal owner, not beneficially interested in the voyage or employment of the vessel, cannot recover consequential damages.—*Whiteway v. Power*

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Shipping—Collision—Regulations for preventing collisions at sea, Article 18.

Two steamships, on opposite courses on the Atlantic, when nearly a mile apart, sighted each other. The *Cyphrenes* was steering E. $\frac{1}{2}$ N.; the *La Flandre* W. S. W. Both ships were making full speed. Within five minutes of mutually sighting each other the ships came into collision, the *Cyphrenes* striking the *La Flandre* on the port side at an angle of 6° or 7°, and twice after on the same side before passing her stern. Beyond these facts the parties were not agreed, and the pleadings and evidences were in absolute contradiction and differed irreconcilably. The *Cyphrenes* was wrecked by the collision and abandoned by her crew. Her owners and the owners of the cargo and freight afterwards instituted proceedings, alleging that the *La Flandre* was alone to blame; the latter ship defended, and counter-claimed on the grounds that the collision was entirely due to the fault of the *Cyphrenes*.

Held—The *Cyphrenes* was alone to blame and judgment should go against her, and the counter-claim of the *La Flandre* be allowed, in that the *Cyphrenes* should, on seeing the *La Flandre's* red light, have reversed her engines full speed, have kept her helm to port and answered the international signal of the *La Flandre*, none of which regulations she observed but which were all observed by the other ship. *S. S. Cyphrenes v. S. S. La Flandre*

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Demurrage—Fixed number of lay days—Liability of chartered for delay caused by bad weather.

By a charter party for a voyage with a cargo of lumber from one part of Newfoundland to another, ten days were allowed for lay days and eight days for demurrage at a fixed rate. The master was unable, from weather and sea, to land the cargo within the lay days, and expended seven other days in so doing. In an action for demurrage for these seven days the defendants contended that the state of the weather relieved them from liability.

Held—The defendant was liable for demurrage unless he could show that through some act of the plaintiff he was pre-

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vented from performing the contract. The state of the weather would not relieve the chartered from demurrage unless so stated in the charter party. *Steer v. Phillips* 586

Extraordinary expenditure—Power of master of fishing vessel to bind outfitter.

Where a fishing vessel fitted out with all needful supplies put into a port before her return home, not in distress, the port being in communication with the owner, and the master made purchases from plaintiff. In an action against the owner to recover the amount of the goods delivered—

Held—Master has no power to bind the credit of the ship-owner, except were absolutely required and when he cannot communicate with his owners. *Giovannini v. Rorke* 578

Sale of ship—Appurtenance—Coal.

On the sale of a ship, lying in port, coals in her at the time are not a part of the ship, nor are they covered by the words "tackle," "appurtenances," &c., and do not pass to a purchaser of the ship unless expressly mentioned. *S. S. Hope & Panther Company v. Baine, Johnston & Company* 881

Salvage—Meritorious services—Exclusion of master and crew from derelict by salvors—Salvage a maritime lien—Misconduct of salvors.

The s. s. "Greyhound," a part packet and part tug-boat, fell in with the "J. L. Mayo," a fishing schooner, 84 tons, about fourteen miles from the port to which the "Greyhound" was bound, in an abandoned condition, dismasted, both cables out, drifting on the rocks. Volunteer crew went on board with difficulty, and by great care and skill she was taken in tow, and brought safely to Harbor Breton.

Held—That although time expended was of short duration, services were of meritorious character. That (1) Salvage confers a lien independent of possession; (2) Salvors in ordinary cases do not acquire sole management of the ship, they only act under suffrance; (3) In cases of derelict, the first occupants have exclusive possession; (4) If able unaided to save ship, salvors may prevent other salvors from interfering with them; (5) Salvors are bound to give up charge to the master on his claiming charge; (6) Gross negligence or misconduct of salvors may cause a forfeiture of all claim. *The J. L. Mayo* 30

Salvage—Temporary abandonment — Salvage services — Wreck and Salvage Act, 1880.

A craft came up with an abandoned schooner, and having taken her in tow, conveyed her to port. On the route the salvors were met by a tug with members of the crew of the salvaged vessel on board, who were returning to their vessel in the hope

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of saving her. A claim was made on the owners of the vessel salvaged for salvage. The owners contended there was no liability on the grounds, (1) no abandonment; (2) forfeiture of any claim by non-compliance with the Wreck and Salvage Act which imposed on them the duty to deliver wreck to Receiver General.

Held—The salvors were entitled to salvage although there was only a temporary abandonment; the services were meritorious, the vessel having been rescued from impending danger. Where the derelict is returned to the owner, as in this case, the provisions of the Wreck and Salvage Act do not apply. *Thorburn v. Whiteway.*

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SHIPWRECKED CREWS. *See* CONTRACT.

SLANDER. *See* DEFAMATION.

SLANDER OF TITLE. *See* DEFAMATION.

SPECIFIC PERFORMANCE. *See* LANDLORD AND TENANT.

STATUTE OF FRAUDS—

Sale of goods—No memorandum in writing—Non-delivery.

The plaintiff agreed to furnish 1500 railway sleepers to defendant at a value of \$500. Defendant refused to take delivery. No part of sleepers delivered. Contract not in writing. Nothing given in earnest.

Held—There being no memorandum in writing, no earnest money, no delivery, actual or constructive, no acceptance by vendee, the plaintiff was not entitled to recover. *Martin v. Newfoundland R. R. Co.*

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SUNDAY—WORK ON. *See* MASTER AND SERVANT.

SURRENDER OF LEASE. *See* LANDLORD AND TENANT.

TAX. *See* BAIT ACT.

TERRITORIAL JURISDICTION. *See* COURTS AND LEGISLATURE.

THREE-MILE LIMIT. *See* COURTS.

TIME. *See* INSURANCE.

TITLE—

Trover of seals on ice fields—Rights of property in round seals.

Where the crews of vessels distributing themselves over large areas of the ice fields, indiscriminately slaughter seals as they go, leaving them round, taking no heed to collect, or mark, or pan the same.

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TITLE—continued

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Held—No right of property is acquired in the said seals.—The killing must be accompanied by possession; the finder of the body of a seal, without any *indicia* of property, is the owner of the same, unless the party claiming as of right against him be in a position, then and there, to assert his right of property, point to the specific seals, and exercise corporal control over them. *Power v. Kennedy; Kennedy v. Power* .

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Trover — *Ownership* — *Special damage arising to plaintiff by reason of conversion.*

The plaintiff claims \$1,000 damages for taking and conversion by defendant of fifty tons of timber. Defendant alleges he purchased from vendor, who sold to plaintiff, and before the property had passed to him.

Held—That the plaintiff is entitled to recover for thirty tons, that quantity having passed to him before it was sold the second time to the defendant by the original vendor. *Hayes v. Carter*

1

TRADE MARK—

Registration—*User of distinctive words in registered trade mark by other persons at time of registration*—*Act "Merchandize Act"*—*Essential particulars.*

The plaintiffs, who were fish merchants, applied to the Colonial Secretary to register as a trade mark in respect of fish the words "Prime Dry Codfish, St. John's, Nfld." in circular shape, with a red star in the centre, etc., and were refused. A rule was obtained calling on the Colonial Secretary to shew cause why a *mandamus* should not issue directing the registration of same. It was contended that the only distinctive part of the trade mark was the star, and justified refusal to register the whole.

Held—That the applicants are entitled to have the descriptive words registered, but not for the purpose of giving an exclusive right or use. *Ex parte P. G. Tessier*

423

TREATIES. See CROWN.

TRUSTEES—

Remuneration for services—residue—agreement—Estoppel.

The insolvent estate of Steer paid dividends to the amount of fifty cents in the dollar, when an agreement was entered into whereby the creditors accepted a further dividend of four cents in the dollar in lieu of a realization and distribution of the residue. All parties interested, including trustees of Commercial Bank, consented to this arrangement, and Steer was granted his certificate of insolvency and final discharge. Steer's trustee retained an amount for commission to which the trustees of the Commercial Bank objected, and brought the present proceedings to have the said amount distributed among the creditors of Steer.

TRUSTEES—*continued.*

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Held—That the trustees of the Commercial Bank were not estopped from questioning the claim of the trustees of Steer by reason of the above arrangement. *In re estate John Steer* . . . 902

Assignment for benefit of creditors—Trustees—Increased labors—Additional remuneration.

At a meeting of Tessier's creditors Donnelly and Goodfellow consented to act as trustees under a deed of assignment for the benefit of creditors at a remuneration of one per cent. on the realized assets of the estate, on the assumption that Tessier's business was properly managed. It subsequently appeared that owing to the condition of the books, accounts, etc., that the labors of Donnelly and Goodfellow were much greater than anticipated.

Held—On an application for additional remuneration, that the trustees were so entitled. *In re P. & L. Tessier, ex parte Goodfellow, et al* 888

TRUST MONEYS. *See* INSOLVENCY.

VENDOR AND PURCHASER—

Covenant for good title—Measure of damages for breach.

Where property was seized by a Customs' officer for breach of revenue law, and it became forfeited and was sold at public auction; the owner afterwards sued the purchaser in trover for the property, alleging that the Crown or Customs' authority had no property in the same, and could not sell the same.

Held—(Pinsent, J., differing)—The right of property and possession was in the Crown. There was sufficient cause to justify a seizure and consequent forfeiture. Once the property became forfeited the Crown had a sufficient title to sell. *McPherson v. Brownrigg*. 691

Covenant for good title—Breach—Measure of damages.

The defendant being a joint proprietor, in unpartitioned landed property, sold his interest to the plaintiff. The deed of assignment contained the measurements. Shortly after the purchase, the property was partitioned, and subsequently sold to a third party. An adjoining proprietor in an action of trespass recovered a certain portion of the land, which under the partition deed had become the plaintiffs. The partition was then rectified and the plaintiff claimed damages against the defendant for breach of covenant of good title; plaintiff having had to indemnify the party to whom he sold to the extent of the rectification. The defendant contended he had only sold his "right, title and interest," that he was an innocent party, and that at the most the only damages to which he could be made to respond to would be a proportion of the original purchase money.

VENDOR AND PURCHASER—continued.

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Held—The covenant was absolute. The measurements falling short of the description, the plaintiff was entitled to be indemnified. The measure of damages was not to be estimated on the speculative value of land, but, in proportion to what was paid for the whole by the plaintiff. *Curran v. Carnell* 375

Conditions of sale—Goods at risk of vendee—Destruction of goods—Reasonable time to take delivery, what is—Recovery of money back upon failure of consideration.

The defendants sold to the plaintiffs, in March, 1892, a quantity of codfish then in the defendant's store. One of the conditions of the sale-note, which was signed by the parties, set forth that if the fish was taken delivery of in less than one month the vendee was to have the privilege of rejecting the "dunn" fish which the bulks sold would contain; nothing was said as to the time within which the delivery should take place. The total sum paid for the fish was \$11,967.75. No delivery of any part of the fish was taken till the last days of May, when about one-third was removed. In July, 1892, the defendants' premises was destroyed, and with them the undelivered portion of the fish. The plaintiffs, having brought an action against the defendants to recover back the value of the undelivered portion of the purchase,—

Held—That the plaintiffs were not entitled to recover, in that it was shown that the fish at the time of the loss was at the purchaser's risk—the vesting of the property in the purchaser was immaterial. Where the failure of consideration, i. e., the delivery of the goods, was due to the neglect of the vendee it is doubtful on this ground alone if, having paid their money, they could recover it back. *Harvey & Co. v. Goodfellow & Co.* 834

Conditions of sale—Goods at risk of vendor—Destruction of goods—Reasonable time for delivery—Statute of Frauds.

On the 23rd June, 1892, a contract was entered into between the plaintiff and defendant for the purchase of 1,700 quintals of fish, to be taken delivery of after being weighed and culled from the plaintiff's store. A portion of the fish was delivered to the defendant and taken away by him. On the 8th of July the balance remaining undelivered was destroyed by fire in the plaintiff's store, and had not been weighed or culled. In an action by the plaintiff for the price and value of the undelivered portion of the fish—

Held—When anything remains to be done to the goods for the purpose of ascertaining price, such as by weighing or culling, when the price depends on the quantity and quality, the performance of these things shall be a condition precedent to the transfer of the property, unless the contract discloses a different intention. Upon a sale, the property will continue at the risk of the vendor until everything has been done which was required to be done by the conditions of the sale. *Murray v. Goodridge*

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VESTING ORDER. *See* INSOLVENCY.

WAGES. *See* INSOLVENCY.

WATERS. *See* CROWN.

WAY—

Complaint under Crown Lands' Act—Obstruction to highway—Dedication—Public user.

On the trial of a complaint under the Crown Lands' Act for obstruction to a public cove or highway, it appeared that the defendants claimed to own the land, and that, although the public had used the same for a number of years, there had never been any dedication to constitute a user by the public.

Held—That the open user by the public of a way as of right raised a presumption of the existence of the public right, and when such user is proved, the onus lies on the person who seeks to deny the inference from such user to show that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed. *Sur. Gen. v. Kean.*

683

WHALING AGREEMENT. *See* CONTRACT.

WILL—

Construction as affected by codicil—Where legatee dies before legacy vests in him—Accumulation legacy.

Held—Where the legatee dies before the legacies bequeathed him vest in him his executor can take nothing under the bequest. Where the bequest is an accumulation of a sum left in trust to be put at interest, it is in the nature of a joint tenancy, and one of the legatees dies before the final period of accumulation has arrived, his representatives do not share in the accumulation, and his share accrues to the others jointly interested. The yearly accumulations do not vest year by year, the fund is indivisible. *In re estate Neil McDougall*

7

Construction of—Codicil—Revocation—Ademed legacy.

The testator, under his will, bequeathed to a legatee three certain bequests, all in one numbered clause of will, to the second of which was attached a proviso creating a charge. The property constituting the bequest to which this condition or charge was attached, was ademed in the life of the testator, and the legatee claimed that the proviso or charge did not attach to the whole clause of the will or the remaining bequests, but only that bequest to which it was structurally attached.

Held—That although the three bequests were in one clause they were separate and distinct, and the qualification or charge imported at the end of the second bequest extended to it alone. A confirmation of a will by a codicil does not revive an ademed legacy. In construing a will the court has regard to structure and punctuation. *In re John H. Warren*

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WILL—continued.

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Invalid—Agreement, certain next of kin to give effect to.

The testator executed a document as his last will, which was invalid and not admitted to probate. Administration was granted on the petition of certain of the next of kin, and it was agreed that the administrator should distribute the estate in accordance with the terms of the document executed by the testator. This was afterwards opposed by those of the next of kin who were not parties to this arrangement, and who claimed a distributive share, as in the case of an absolute intestacy. On application by the administrator for direction of court—

Held—Those of the next of kin who signed arrangement giving effect to testator's will are bound by everything done under it by the administrator, but such an arrangement can have no effect, nor is it in any way binding, on those who did not sign it. No agreement, however solemnly entered into by any number, could bind others who refused being a party to it. *In re Jacob Chafe*

182

Holograph—Construction of—Apportionment of annuities—Supplying words to perfect bequest.

The testator left an annuity. The annuitant died within the first year.

Held—That his estate is not entitled to any portion of the annuity, as annuities cannot be apportioned. Imperial Act 4 Wm. IV., c. 22, which provides for apportionment of annuities, does not apply to Newfoundland.

Held—That where a clause is imperfect and unfinished, and testator's meaning is obvious, the court will supply the words to perfect the bequest. *In re estate Charles Fox Bennett*

36

Proof in solemn form—Execution, invalidity of—Signature top of will.

Where the testatrix had executed her will at the top by affixing her mark instead of at the bottom as is customary, it was contended that the will was not duly executed in accordance with the local Wills Act and the law.

Held—The Act does not require the signature to be made at any particular part of the will. The signature at the top of the will fulfils the requirements of the statutes. *In re Catherine Walsh*

738

Execution of—Testator a marksman—Newfoundland Wills Act, Consolidated Statutes, cap. 30.

Where a creditor cited the next of kin to propound the testator's will it appeared that the testator had executed his will by making his mark in the presence of two witnesses, one only of whom signed in his presence, the other subsequently signed it, but not in the presence of the other witness.

WILL—continued.

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Held—That the will was inoperative, and could not be admitted to probate, not having been signed in the presence of testator and of the other witness, and testator must be held to have died intestate. *In re estate Thomas Dunn*

82

Estate for life—Remainder vested, subject to be contingent—Insolvency—What property passes to trustee.

Where a devise of land and dwellings was made by a testator to his wife, for the term of her natural life, (the subject matter having been already conveyed by deed to the same effect), and the reversion and remainder to his son, in the event of his surviving his mother; the son became insolvent and his assets passed to his trustee. Some time after the declaration of insolvency his mother died, and the trustees of his insolvent estate claimed that his reversionary interest in the property vested in them on death of mother. It was contended for insolvent that at date of insolvency no interest had vested in him, but only an expectancy.

Held—That at date of insolvency the insolvent had a contingent executory interest—a *quasi* contingent remainder, a saleable and assignable interest in property—and could have sold out and released the reversion, and that this asset passed to the trustees of his insolvent estate. *Trustees Finlay v. Finlay*

262

Construction—Bequest of estate for life—Meaning of "issue" and "lawful issue."

Where the testator made certain bequests to his daughters, limited and conditioned by the words "issue" and "lawful issue."

Held—That the words "issue" and "lawful issue" must be read children, and not extended to remote issue, and that the grandchildren of testator cannot take with his children on the death of one of them holding an estate for life. *Winter v. Budden*

26

Petition of executor for directions—Application of bequest—Misdirection of legatee.

Where the testator made a bequest to a society, and it was found no society exactly corresponding to the designation given was known,

Held—If the society is misdescribed, the court will, if possible, discover from surrounding circumstances, what society was intended. The court will admit extrinsic evidence to determine what the testator's words express. Evidence to show that the testator subscribed to a particular society will be admitted, to show what was in his mind when he made the bequest. *In re Estate Robert Alexander*

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WILL—continued.

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Construction—Lapsed legacy—“Newfoundland Wills’ Act,” 17th section—Meaning of words “living at time of death of testator”—Legacies to tenants in common nomination when legatee predeceases testator.

The Newfoundland Wills’ Act, Consolidated Statutes, 17th section—(same as English Act, 1 Vic., cap. 26, sec. 33)—provides “where any person being a child, or other issue of the testator, to whom any property shall be devised or bequeathed for any estate or interest, not determinable at or before the death of such person, shall die in the lifetime of testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect.”

Held—That a child *en ventre sa mere*—the father legatee—having predeceased the testatrix, is to be regarded as issue “living” at the death of testatrix, and that the legacy does not lapse. Where legacies are given to legatees as tenants in common nomination, if any die before the testator, their portion or share would lapse into the general estate. *Duder v. Duder*.

10

Construction—Gift of freehold and monies to devisees free from control of husband—Survivorship of husband right to wife’s share.

A testator devised to five daughters, amongst other bequests, the residue of his estate, monies in banks, rents and proceeds of sales of properties equally amongst them or their issue free from control of husbands, and in the event of death of either without issue, her share was to be apportioned equally amongst survivors. The land was not sold but apportioned amongst certain of the devisees under power of an agreement between the devisees and executors. One of the devisees to whom land had been assigned died without issue. The survivors claimed from her husband the share of the moneys which had been allotted his wife, and also the land conveyed to her, contending that the arrangement as to the division of land and release given to executors was not intended to interfere with the terms of the will as to survivorship on the death of either without issue.

Held—That the period of division was on death of the testator, and that the survivors at that time took the whole of their respective legacies. The deed of arrangement was a final and absolute distribution *inter se*, and the parties are estopped, not having made any reservation as to survivorship in their release to the executors from setting up their claim on that ground.—The claim to the corpus of the bequest is altogether inconsistent with the nature of their claim, attaching, as it did, only to unexpended or undisposed of monies or property. *Mosedale v. McDougall*

732

Construction—Limitation of estate—Absolute estate—Contingency—Life interest.

Testator bequeathed certain freehold property, in trust, for the use of his two sons, and, should both his sons die without leaving issue, to his daughter for life, and, after her decease, to the use of her children, and should she die leaving no child or children, then to the use of his next of kin; one son having died leaving a child.

Held—That the interest of the two sons was an absolute one.

Testator bequeathed a sum of money to his executors in trust for his daughter for life, after her decease for her children, share and share alike, and in case she should die leaving no child or children her surviving, to the use of his two sons, share and share alike, for life; and, on the death of either, one-half thereof to the children of the deceased son, the other half to the survivor until the death of the survivor, then the whole to be divided between the children of his sons, share and share alike. The daughter having predeceased both sons, leaving no children, and one of the sons having died leaving a child,—

Held—That during the lifetime of the surviving son, the interest goes half to such son, half to the child of deceased son, and, on the death of such survivor, the principal to go to the children of both sons, share and share alike; and, in the event of the surviving son dying without leaving a child, the whole principal to go to the child of the other. *Prowse v. Harvey* .

869

Testamentary capacity—Partial unsoundness of mind—Coercion—Fraud.

On the proof of the will of testator it was contended that, at the time of making, he was of unsound mind, blind and deaf, and that the will was obtained by the fraud and coercion of some of the next of kin. The matter being fully heard and a number of witnesses called—

Held—It is sufficient if the testator has such a mind and memory as will enable him to understand the disposition of his property in its simple form. In deciding upon the capacity of the testator it is the soundness of his mind, and not the state of his bodily health that must be regarded. To support undue influence it must be shown to have amounted to coercion destructive of free agency. The will was admitted to proof. *In re John Ashley* .

447

Construction—Trust—Gift of corpus with restraint on anticipation.

Testator bequeathed £10,000 in trust for the use of two sons, share and share alike, for life; on the death of either, then a moiety to children of deceased son until decease of surviving son, and the other half for use of surviving son, when, on his death, the whole to the use of the children of sons, share and

share alike. One of the sons died, and the guardian of his infant child claimed that half of the sum became an absolutely vested interest in the infant, and subject to future contingency. On seeking direction from the court—

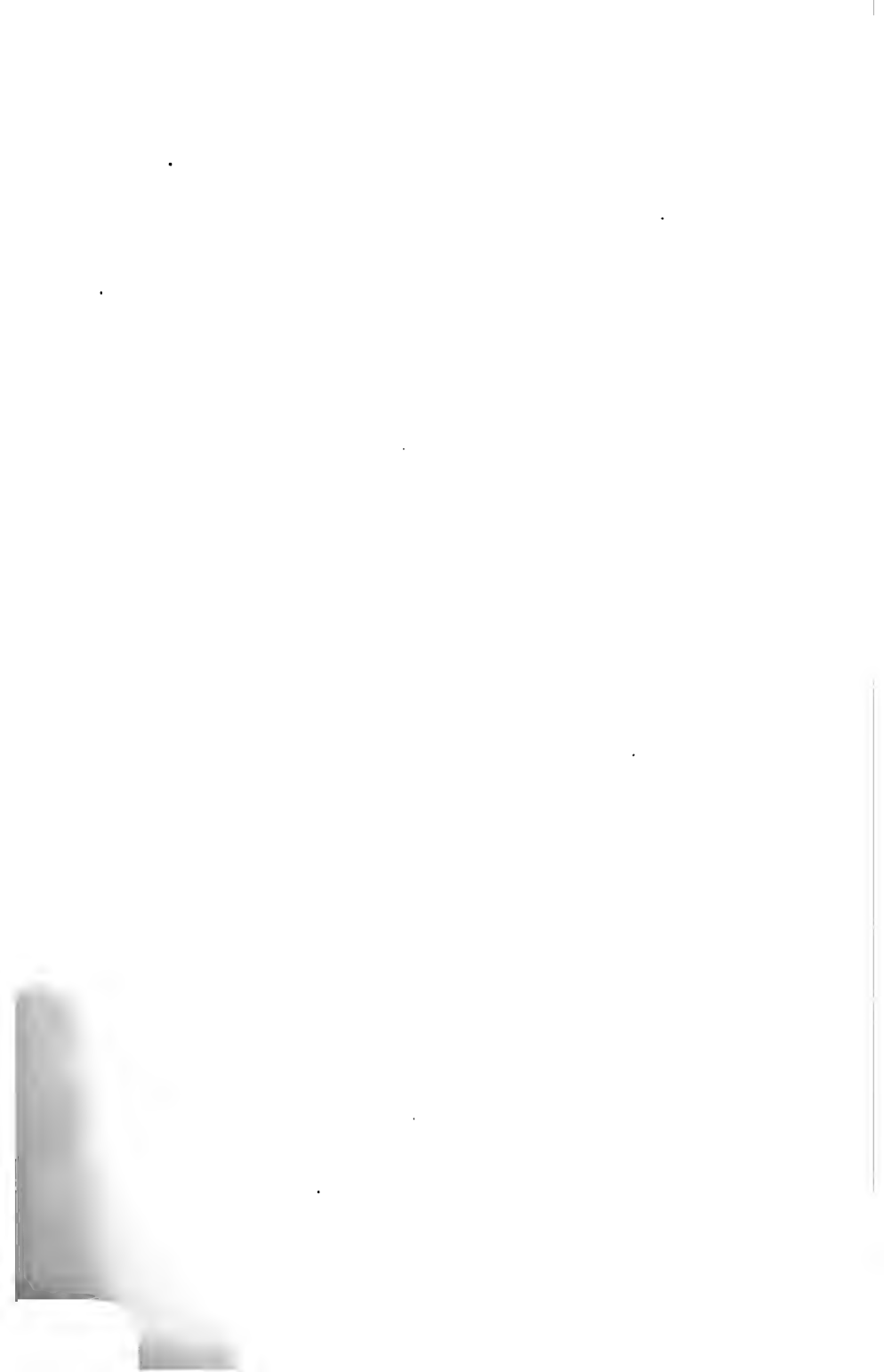
Held—That only a life interest is provided until the death of testator's surviving son, when his grand-children have to be ascertained, and these will then take the whole *per capita*, not *per stirpes*. The whole of the bequest vests in the trustee till the death of the surviving son. The guardian of the infant is entitled to interest on the moiety, but not to the *corpus*. (The Chief Justice, though not affirmatively deciding, was of opinion that the *stirpital*, and not the *per capita*, construction was more consonant with the intention of testator. *In re Edwin Duder* . 186

WINDING UP ACTS. *See* COMPANY.

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